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APPENDIX "A"

FAYETTE CIRCUIT COURT

DIVISION No. ____

Civil Action No. 25992

SOUTH HILL ASSOCIATION, INC., a non-profit incorporated corporation of Kentucky; and Curtiss Harrison; and on behalf of themselves and other taxpayers, property owners and historic preservation groups and persons similarly situated, - - - - - - - - - *Plaintiffs,*

v.

LEXINGTON URBAN RENEWAL AND COMMUNITY DEVELOPMENT COMMSSIION, ROBERT E. FEATHERSTON, Chairman; WILLIAM R. EMBRY, Vice-Chairman; BYRON ROMANOWITZ, Member; D. C. NOBLE, Member; H. J. HAGLER, Member; JENNIE BRYANT, Acting Director of the Lexington Urban Renewal and Community Development Commission; CITIZENS UNION NATIONAL BANK, INC., a Kentucky Corporation; NORWOOD CONSTRUCTION COMPANY, a Kentucky Corporation, and J. NORWOOD HODGE, President of Norwood Construction Company, - - - *Defendants.*

COMPLAINT—Filed October 16, 1969.

Comes the Plaintiff and for its cause of action states:

1. Plaintiffs are the South Hill Neighborhood Association, Inc., a non-profit corporation composed of 500 members with Offiecs in Lexington, Curtiss Harrison,

341 Madison Place, Lexington, Kentucky, President of the South Hill Neighborhood Association.

2. Defendants are the Lexington Urban Renewal and Community Development Commission, a public body under KRS 99.330 et. seq., Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, all members of the Commission, Jennie Bryant, Acting Director of the Commission, and Norwood Construction Company, Lexington, Kentucky, and J. Norwood Hodge, President.

3. Defendants by formal action on October 14, 1969 have entered into a certain demolition contract whereby Norwood Construction Company is obligated to immediately raze and destroy certain buildings taken for a public purpose by the Commission which are located on the south one-half of the 200 and 300 blocks of High Street, Lexington, Kentucky, and which are registered as a Historic District on the National Register of historic places established under the National Historic Preservation Act of 1966 and maintained by the Department of Interior, National Park Service. Said contract was executed by the Commission in violation of the provisions of KRS 99.330 et. seq., the Housing Act of 1949 as amended and the National Historic Preservation Act of 1966, Public Law 89-665. Specifically, the Commission in executing the demolition contract to the detriment of the health, safety, and welfare of the people of the Commonwealth exceeded its powers under KRS 99.360(1)(a) and (b) and KRS 99.330(2)(a) and (b).

4. The Commission has ordered the immediate demolition of the buildings and Plaintiff is informed and believes that Norwood Construction Company intends and expects to enter upon the land and commence de-

struction of the buildings on October 16, 1969, unless sooner restrained.

5. Plaintiff is challenging the validity of this Commission action in a suit for injunction in the Federal District Court but due to the temporary physical absence of both federal District Judges from the City of Lexington, is unable to bring before that Court its motion for Temporary Restraining Order restraining defendants from destroying the buildings before the buildings are destroyed under the contract herein, thereby mooting plaintiff's case under both state and federal law, destroying the jurisdiction of the court, and causing irreparable injury to Plaintiff for which no adequate remedy at law exists, all of which more fully appears in the Affidavit of Curtiss Harrison attached hereto.

Wherefore, Plaintiff prays this Court issue its order temporarily and permanently restraining all defendants from proceeding under the demolition contract and further issue its mandamus to the defendant public officials to vacate their formal action executing the contract.

(s) Eugene F. Mooney,
Attorney for Plaintiff,
College of Law,
University of Kentucky.

APPENDIX "B"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - - *Defendants.*

ANSWER AND COUNTERCLAIM.

Come the Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal corporation (hereinafter sometimes referred to as "Urban Renewal"), Robert E. Featherston, Byron Romanowitz, D. C. Noble, H. J. Hagler, Jennie Bryant, and Citizens Union National Bank and Trust Company, Inc., a Kentucky corporation (all these Defendants hereinafter referred to sometimes as the "Defendants") and for their Answer to the Complaint and Amended Complaint of the Plaintiffs state as follows:

FIRST DEFENSE.

The Complaint and Amended Complaint fail to state a claim upon which relief can be granted.

SECOND DEFENSE.

The Complaint and Amended Complaint should be dismissed on the ground that the City of Lexington, a munic-

ipal corporation validly existing and duly organized under the Laws of the Commonwealth of Kentucky, is an indispensable party to this action.

THIRD DEFENSE.

The Complaint and Amended Complaint should be dismissed on the ground that the Plaintiffs are not the real parties in interest and have no standing or capacity to bring this action.

FOURTH DEFENSE.

(1) The Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 1 of the Complaint and therefore deny such averments.

(2) The Defendants admit that the averment contained in paragraph 2 of the Complaint and Amended Complaint that Urban Renewal is a municipal corporation validly existing and duly organized under Chapter 99 of *Kentucky Revised Statutes*. The Defendants admit the averment contained in paragraph 2 of the Complaint that the Defendants, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble and H. J. Hagler are members of Urban Renewal, a municipal corporation. The Defendants admit the averment contained in paragraph 2 of the Complaint that Jennie Bryant is the acting Director of Urban Renewal. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the averments contained in paragraph 2 of the Complaint and Amended Complaint and therefore deny such averments.

(3) The Defendants admit the averment contained in paragraph 3 of the Complaint and Amended Complaint that on October 14, 1969, Urban Renewal entered into a valid Contract with Norwood Construction Company, whereby Norwood was to demolish certain buildings owned in fee simple by Urban Renewal. The Defendants are without

sufficient knowledge or information to form a belief as to the averment contained in paragraph 3 of the Complaint and Amended Complaint that the south one-half of the 200 and 300 blocks of High Street, Lexington, Fayette County, Kentucky, are registered as historic districts on the National Register of Historic Places, established under the National Historic Preservation Act of 1966, Public Law 89-665. The Defendants deny each and every other averment contained in paragraph 3 of the Complaint and Amended Complaint.

(4) The Defendants admit the averment contained in paragraph 4 of the Complaint that Urban Renewal has ordered Norwood to demolish certain buildings owned in fee simple by Urban Renewal located on the 200 and 300 blocks of High Street, Lexington, Fayette County, Kentucky. The Defendants do not have sufficient information or belief to either admit or deny the remainder of the averments contained in paragraph 4 of the Complaint and therefore deny such averments.

(5) The Defendants deny each and every averment contained in paragraph 5 of the Complaint.

FIFTH DEFENSE.

The Complaint and Amended Complaint should be dismissed because the Plaintiffs are guilty of laches, estoppel, and have waived any rights they may or might have under law in that:

(1) Prior to July 10, 1969, Urban Renewal invited proposals from the public for the redevelopment of a parcel of land fronting on High Street, Upper Street, Vine Street and Mill Street in the City of Lexington, Fayette County, Kentucky.

(2) On or about July 10, 1969, an entity known as Historical Lexington, Incorporated, submitted a proposal for the preservation and restoration of a portion of the 200 block of West High Street.

(3) The proposal of Historical Lexington, Incorporated did not comply with the "Instruction to Bidders," attached to and made a part of the inivitation for proposals for the redevelopment of such land theretofore issued by Urban Renewal.

(4) The Plaintiffs did not respond to the invitation for proposals of Urban Renewal and did not submit a proposal for the redevelopment of such land, a portion of which is the subject matter of this action.

COUNTERCLAIM.

Come the Defendants and for their Counterclaim against the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison, and the Surety on the Bond of the Plaintiffs, Jane Townsend, state as follows:

(1) The Restraining Order issued by this Court on or about October 16, 1969, was illegal and wrongful.

(2) As a result of the illegal and wrongful restraining of the Defendants, the Defendants have incurred and suffered and will incur and suffer costs and damages in excess of $1,000,000.00, such cost and damages including attorneys' fees, loss of profits, loss of income, and loss of bids and proposals for the redevelopment of certain lands owned in fee simple by Urban Renewal situated in the vicinity of the lands which are the subject matter of this action.

Wherefore, the Defendants demand Judgment against the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison, and Jane Townsend, Surety on the Bond of Curtiss Harrison, as follows:

(1) For damages in the amount of $1,000,000.00,

(2) that the Complaint and Amended Complaint of the Plaintiffs be dismissed and held for naught,

(3) that no Injunction be issued herein enjoining and restraining the Defendants from any acts, including the demolition and destruction of that real property owned in

fee simple by the Defendant, Urban Renewal, on High Street in Lexington, Fayette County, Kentucky,

(4) for their cost herein expended, and

(5) for such other and further relief as the Court may deem to be equitable and just.

Kincaid, Wilson, Schaeffer,
Trimble & Hembree,

(s) J. Montjoy Trimble,
Attorney for Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation, Robert E. Featherston, Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; and Jennie Bryant, Acting Director of the Urban Renewal and Community Development Agency of the City of Lexington,

500 Central Bank Building,
Lexington, Kentucky 40507

Strother, Oliver & Strother,

(s) A. Gene Oliver,
Attorneys for Defendant, Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation,

Citizens Union Bank Building,
Lexington, Kentucky 40507

CERTIFICATE.

I certify that the foregoing Answer and Counterclaim has been served by delivering a true copy thereof to Eugene

F. Mooney, Attorney for the Plaintiffs, University of Kentucky, College of Law, Lexington, Kentucky, and to Arthur B. Rouse, Jr., Fowler, Rouse, Measle & Bell, Attorney for the Defendants, Norwood Construction Company, and J. Norwood Hodge, President of Norwood Construction Company, 141 N. Upper Street, Lexington, Kentucky, this 20th day of October, 1969.

(s) J. Montjoy Trimble.

APPENDIX "C"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - *Defendants.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The plaintiffs in this action are Curtiss Harrison and the South Hill Neighborhood Association, Inc., a non-profit corporation composed of members interested in the preservation of certain areas in the City of Lexington. The plaintiffs have instituted this action against the Lexington Urban Renewal and Community Development Commission.

The Urban Renewal Commission has acquired certain property within the City of Lexington, including the block fronting on West High Street between Upper and Mill Streets. The Urban Renewal Commission has entered into an agreement with the defendant, Citizens Union National Bank & Trust Company, which proposes to erect a new modern bank building on the block. Pursuant to its agreement with the Citizens Union National Bank & Trust Company, the Urban Renewal Commission has entered into a contract with the defendant, Norwood Construction Company, for the demolition of all buildings on the south side of High Street between Upper and Mill Streets. The president of the Norwood Construction Company is also joined as a defendant.

The buildings to be demolished included some of the oldest buildings now standing within the City of Lexington. These buildings are of significant historical value. Because of their historic, architectural and cultural significance, fourteen buildings located on the north side of West High Street between Limestone and Broadway (including the buildings in issue here) have been listed in the National Register of Historic Buildings established by the National Historical Preservation Act of 1966, 16 U.S.C.A., Section 470a. The National Historical Preservation Act of 1966 also creates an Advisory Council on Historic Preservation, 16 U.S.C.A., Section 470i. Under Section 106 of the National Historical Preservation Act of 1966, a federal agency must take into account any building included in the National Register which would be affected by any project involving an expenditure of federal funds. In addition, the federal agency must also afford the Advisory Council a reasonable opportunity to comment with regard to the undertaking. 16 U.S.C.A., Section 470f.

The present urban renewal plan of the Urban Renewal Commission involves the expenditure of federal funds and was also subject to approval by the Department of Housing and Urban Development (HUD). The plaintiffs assert that HUD has violated the National Historical Preservation Act of 1966 by failing to afford the Advisory Council an opportunity to comment on the destruction of the buildings in question pursuant to the defendants' urban renewal plan.

This action was commenced on October 16, 1969, at which time plaintiffs obtained a temporary restraining order for the purpose of preventing the defendants from proceeding with the demolition of the ancient buildings. The complaint alleged that the plaintiffs were filing an action against HUD and its officials in the United States District Court for the Eastern District of Kentucky for the purpose of enjoining the demolition of the buildings in question. The complaint alleged that neither of the Federal District

Judges for the Eastern District of Kentucky were available and that the defendants would accomplish the demolition of the buildings before plaintiffs were able to secure a hearing in Federal Court. The plaintiffs sought the intervention of this court to preserve the buildings in question until the Federal Court could act. There is nothing in the record in this case to indicate the pendency of any action in Federal Court. However, from statement of counsel, which was not disputed, it appears that an action was commenced in Federal Court on October 17, 1969, that a motion for a temporary restraining order was presented to Judge Swinford on October 20th, and that Judge Swinford will rule on the matter at the call of the Lexington Docket on October 27th.

A hearing was held on the plaintiffs' motion for a temporary injunction on October 20, 1969. At this hearing, no oral testimony was offered. All parties submitted the issue on the affidavits in the record.

On October 14, 1969, at an evening meeting, the Urban Renewal Commission accepted the bid of the defendant, Norwood Construction Company, for the demolition of the buildings in question. During the day of October 15, 1969, the Urban Renewal Commission was informed that the plaintiffs would seek to enjoin the demolition of the buildings. Norwood Construction Company commenced destruction of the buildings that evening and continued spasmodically until service of a restraining order and an amended restraining order were served the morning of October 16th. Unless restrained, the defendants will continue with the complete demolition of the buildings and thereby destroy forever whatever value they may possess.

As a citizen and taxpayer of the City of Lexington, Curtiss Harrison has standing to question whether the members of the Urban Renewal Commission are proceeding in violation of any statutory law of the state. Ky. Utilities Co v. Ginsberg, 255 Ky. 148, 72 S. W. 2d 738; Weller

v. McCauley, 383 S. W. 2d 356. While the Court has some question as to the right of the South Hill Association to prosecute this action on behalf of its members or other citizens and taxpayers of the city, the Court need not decide this question since it does conclude that Curtiss Harrison is a proper plaintiff.

Even though the plaintiff, Harrison, has standing to prosecute this action, it does not follow that this Court can substitute its judgment for that of the Urban Renewal Commission. Whether or not these buildings should be preserved for their historic value or whether the interests of the City of Lexington can best be promoted by the erection of a new bank building, are not questions which call for a judicial decision. These decisions involve the exercise of the legislative and executive power by the Commission which is a body politic exercising governmental functions. Under our form of government which provides for the separation of powers, this Court can exercise only judicial powers. American Beauty Homes v. Louisville, 379 S. W. 2d 450. This Court cannot determine whether the demolition of the buildings is wise or folly. The Court can only consider whether the Urban Renewal Commission has exceeded its powers or has failed to follow the statutory procedure for the enactment of an urban renewal plan. Dinwiddie v. Urban Renewal & Community Development Agency, 393 S. W. 2d 872; Scenic Hudson Preservation Conf. v. Federal Power Com'n., 354 F. 2d 608, at 620; Powelton Civic Home Owners Ass'n. v. Dept. of Housing & Urban Dev., 284 F. Supp. 809, at 818-820, 829-832.

Urban renewal necessarily affects older buildings, and KRS 99.360(1)(d) expressly authorizes the Commission to clear any and all buildings from any real property acquired by it. KRS 99.370 sets forth the prerequisites for the adoption of an urban renewal plan. Unlike the National Historical Preservation Act of 1966, the Kentucky urban renewal act does not attempt to provide for the preservation

of buildings of historical interest. Nowhere in the case are any facts which could indicate that the Urban Renewal Commission is exceeding its powers or failed to follow the statutory procedures for the acquisition and development of the land in question.

Even if HUD and the federal officials have violated Section 106 of the National Historical Preservation Act of 1966, any such violation of federal law involves only federal officials. The National Historical Preservation Act of 1966 applies only to federal agencies. The failure of HUD to afford the Advisory Council an opportunity to comment on the destruction of these buildings which appear in the National Register does not give rise to a cause of action against these local defendants.

Courts have, on occasion, exercised equity jurisdiction for the purpose of preserving the subject matter of an action pending in another court. See, 42 Am. Jur. 2d, Injunctions, Section 12; 43 C.J.S., Injunctions, Section 13. While this Court does not have the benefit of the record in the federal action, it does appear that the matter is presently pending before Judge Swinford. This Court knows of no reason why Judge Swinford cannot protect the subject matter of the Federal Court action by the issuance of a restraining order or temporary injunction. Whatever necessity existed on October 16th for this Court to preserve these buildings until the matter could be brought before the proper judge in the United States District Court, that necessity no longer exists.

Therefore, it is the conclusion of the Court that the plaintiffs' motion for a temporary injunction should be denied, and that plaintiff's complaint as amended should be dismissed for failure to state a claim upon which relief can be granted against the defendants.

There remains a counterclaim which has been filed by the defendants to which a responsive pleading is not due. In addition, there is a motion for a rule to issue against the

defendants, Norwood Construction Company and Norwood Hodge, to show cause why they should not be punished for contempt for proceeding with demolition work after being served with the temporary restraining order in the case. The fact that the original restraining order described the property as being 200 West High Street rather than the 200 block of West High Street does not necessarily dispose of this issue. An injunction must not be construed literally to the point of absurdity, and compliance with the strict letter of the injunction is not enough if there is violation of its obvious spirit. Wormald v. Macy, 349 S. W. 2d 199. Therefore, the rule should issue to show cause why they should not be punished for contempt.

While these matters remain to be determined, the order dismissing the plaintiffs' complaint should, pursuant to CR 54.02, recite that there is no just reason for delaying the finality of that order.

This opinion shall constitute the Court's Findings of Fact and Conclusions of Law required by CR 65.03(5). The Clerk will make this opinion a part of the record and the attorneys will prepare an order and judgment in conformity herewith. The temporary restraining order heretofore issued by the Court shall be dissolved upon the entry of said order and judgment.

(s) James Park, Jr.,
Judge.

October 21, 1969.

Copies to:

Attorney for Plaintiffs:
Hon. Eugene Mooney.

Attorney for Defendant,
Urban Renewal Commission,
Hon. Montjoy Trimble.

Attorney for Defendant,
Norwood Construction Company,
Hon. A. B. Rouse.

APPENDIX "D"

FAYETTE CIRCUIT COURT

FIRST DIVISION

No. 25992

SOUTH HILL ASSOCIATION, INC., ET AL., - *Plaintiffs,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - *Defendants.*

JUDGMENT.

This matter came on for hearing before this Court on Monday, October 20, 1969, at 2:30 P.M. in open Court on: (a) Plaintiff's Motion for a Temporary Injunction, (b) Defendants' Motions to Dismiss on various grounds, and (c) Defendants' Motions to dissolve the Temporary Restraining Order and the Amended Temporary Restraining Order previously granted herein on October 16, 1969. The Court having considered arguments of counsel, being sufficiently advised, and having entered therein its Findings of Fact and Conclusions of Law, it is Ordered:

(1) That the Plaintiff's Complaint as amended be and the same is hereby dismissed,

(2) The Plaintiff's Motion for a Temporary Injunction be and the same is hereby overruled.

(3) That a rule issue requiring the Defendants, J. Norwood Hodge and Norwood Construction Company, to show cause why they should not be punished for contempt.

(4) The Counterclaim of certain Defendants is not dismissed and is retained on the docket for further proceedings in accordance with applicable law.

This is a final judgment insofar as the plaintiffs' cause of action is concerned and there is no just reason for delay.

Entered this 21st day of October, 1969.

(s) James Park, Jr.,
Judge, Fayette Circuit Court,
First Division.

To Be Entered,
Notice of Entry Waived:
(s) J. Montjoy Trimble

J. Montjoy Trimble,
Attorney for Defendants, Urban Renewal and Community Development Agency of the City of Lexington, a Municipal Corporation, Robert E. Featherston, Chairman; Byron Romanowitz, Member; D. C. Noble, Member; H. J. Hagler, Member; and Jennie Bryant, Acting Director of the Urban Renewal and Community Development Agency of the City of Lexington,
(s) A. Gene Oliver

A. Gene Oliver,
Attorney for Defendant, Citizens Union National Bank and Trust Company, Inc., a Kentucky Corporation,
(s) Roger Sledd

Roger Sledd,

Of Counsel for the Plaintiffs, South Hill Association, Inc. and Curtiss Harrison,

(s) Arthur B. Rouse, Jr.

Arthur B. Rouse, Jr.,

Attorney for Defendants, Norwood Construction Company and J. Norwood Hodge, President of Norwood Construction Company.

APPENDIX "E"

COURT OF APPEALS OF KENTUCKY

SOUTH HILL ASSOCIATION, INC., and
CURTIS HARRISON, - - - - - - *Appellants,*

v.

URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, ET AL., - - - - - - - - - *Appellees.*

ORDER—Entered October 22, 1969.

After hearing oral argument by counsel for the appellants and the appellees, the court is of the opinion that appellants' motion for injunctive relief under Civil Rule 65.08(1) is overruled.

Entered this October 22, 1969.

(s) Edw. P. Hill, Jr.,
Chief Justice.

APPENDIX "F"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
(LEXINGTON)

Civil Action #2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; THE BLUEGRASS TRUST FOR HISTORIC PRESERVATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; CURTIS HARRISON; MRS. STATHIS KAFOGLIS; MR. & MRS. W. T. DENNIS; on behalf of themselves and all other United States or Kentucky citizens, taxpayers, property owners, or historic preservation groups and persons similarly situated, - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development,

THE CITY OF LEXINGTON, KENTUCKY; HONORABLE CHARLES WYLIE, Mayor of the City of Lexington; THE BOARD OF CITY COMMISSIONERS OF THE CITY OF LEXINGTON; JOSEPH GRAVES, Member of the Board; HARRY SYKES, Member of the Board; THOMAS UNDERWOOD, Member of the Board; FRED FUGAZZI, Member of the Board; URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, a municipal corporation; ROBERT E. FEATHERSTON, Chairman; WIL-

LIAM R. EMBRY, Vice-Chairman; BYRON ROMANOWITZ, Member; D. C. NOBLE, Member; H. J. HAGLER, Member; JENNIE BRYANT, Director of the Urban Renewal and Community Development Agency of the City of Lexington,

CITIZENS UNION NATIONAL BANK AND TRUST COMPANY, INC., a Kentucky corporation; NORWOOD CONSTRUCTION COMPANY, INC., a Kentucky corporation; J. NORWOOD HODGE, President of Norwood Construction Company, - - *Defendants.*

AMENDED COMPLAINT.

JURISDICTION.

1. The action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States; under Title 28 U.S.C. §§ 1331(a), 1361, 1651, 2201, 2202; The Administrative Procedure Act, Title 5 U.S.C. §§ 701, 702, 703, 704, 705; Title I of the Housing Act of 1949, as amended, Title 42 U.S.C. §§ 1441 et seq., more particularly, 42 U.S.C. §§ 1451, 1456(h), 1457, 1460(c), 1460(c)(4), (6), (9), and (10), 1460(d)(2), 3535(d), and regulations adopted pursuant thereto; and under the National Historic Preservation Act of 1966, Public Law 89-665, 80 Stat. 915 (1966), 16 U.S.C. §§ 470-470m, more particularly, Section 106 of the Act, 16 U.S.C. § 470f, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars.

PLAINTIFFS.

2. South Hill Neighborhood Association, Inc., is a nonprofit membership association incorporated under Kentucky Revised Statutes Ch. 273, with offices in Lexington, Kentucky. The Plaintiff association has several hundred members, over fifty percent (50%) of whom live and own

property in the neighborhood bounded by High Street and Maxwell Streets in the City of Lexington.

3. The Blue Grass Trust For Historic Preservation, Inc., is a non-profit association incorporated under Kentucky law, with its principal office in Lexington, Kentucky, which has as its central purpose historic preservation.

4. Curtis Harris resides at and owns the property located at 341 Madison Place, Lexington, Kentucky, which property is located within a few blocks of the National Historic District designated on West High Street. Curtis Harrison is the President of the South Hill Neighborhood Association, Inc., is a United States and Kentucky citizen, is a federal, state and local taxpayer, and is a member of several Kentucky historic preservation groups, among which are Citizens for Historic Lexington, The Bluegrass Trust for Historic Preservation, and Historic Lexington, Inc.

5. Plaintiff Mrs. Stathis Kofoglis, is a widow and is the owner of the property designated as 317 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the tract of land described and set forth in the plans for the City of Lexington Urban Renewal Project. Mrs. Kafoglis is a United States and Kentucky citizen, and a federal, state and local taxpayer.

6. Mr. and Mrs. W. T. Dennis are the owners in fee simple absolute of the property designated as 315 West High Street, which property is located within the area designated as a National Historic District on the National Register of Historic Places, and which property is also located within the boundaries of the Lexington Urban Renewal Project.

7. The named Plaintiffs are representative parties and bring this action under FRCP 23 on behalf of themselves,

and on behalf of all other citizens of the United States, all other citizens of the Commonwealth of Kentucky, all other federal, state and local taxpayers, all other property owners in the City of Lexington, and all other public or private groups and individuals interested in historic preservation, similarly situated. The class as so described is so numerous that joinder of all members is impracticable; there are questions of fact or law common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; the parties defendant opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

DEFENDANTS.

8. The federal defendant George Romney is the Secretary of the Department of Housing and Urban Development of the United States who administers the Housing Act of 1949 as amended, including the federal urban renewal program.

9. The local defendants are the Mayor and the Board of City Commissioners of the City of Lexington, and the Urban Renewal and Community Development Agency of the City of Lexington (hereinafter referred to as the Agency) a municipal corporation, existing under and pursuant to KRS Chapter 100, and acting under KRS 99.330, et seq., and City of Lexington Ordinances adopted thereunder, which agency functions as a local development agency under the Housing Act of 1949, as amended, and which has promulgated and administers the Lexington Urban Renewal Plan pursuant to which the buildings located on the 200 block of West High Street in Lexington, Kentucky, are to be demolished. Individual local defendants Robert E. Featherston is Chairman of the Agency;

William R. Embry is Vice-Chairman; Byron Romanowitz, D. C. Noble and H. J. Hagler are the members of the Agency and individual defendant Jennie Bryant is the Director of the Agency.

10. Private defendant Citizens Union National Bank and Trust Company of Lexington, Kentucky (hereinafter referred to as the Bank) is acting under a land disposal agreement and deed as a redeveloper of the land located in the 200 block of West High Street in Lexington, Kentucky, under and pursuant to the Housing Act of 1949, as amended, and the Lexington Urban Renewal Plan. Private defendant Norwood Construction Company, Lexington, Kentucky, a Kentucky corporation is the successful bidder who has been awarded a contract by the Agency immediately to demolish and raze the buildings located on the 200 block of West High Street. Individual defendant J. Norwood Hodge is president of Norwood Construction Company and directly supervises and directs its bulldozer operations.

FACTS.

11. Located on the south one-half of the 100, 200 and 300 blocks of the North Side of West High Street in Lexington, Kentucky, are fourteen buildings which because of their age, uniqueness, and history are and for many years have been of outstanding historic, architectural, and cultural significance to the city, state and region. The buildings were accepted by the Keeper of the National Registry for Historic Places and listed as the West High Street Historic District on the National Register on July 10, 1969. Official notice thereof was published in the Federal Register on August 5, 1969. The particular West High Street buildings which are located in and integral parts of the Historic District are: 125, 129, 133, 201, 211, 215, 221, 225, 229, 233, the Asbury Methodist Episcopal Church at the corner of West High Street and Mill Street, 303-305, 315, 317 and 319. Seven of the fourteen buildings are located on the South

one-half of the North Side of West High Street in the 200 block and are the specific buildings in controversy here.

12. The Urban Renewal and Community Development Agency of the City of Lexington, Kentucky, (Agency) promulgated its Urban Renewal Area Project Ky. R-63 in December 1965 providing for redevelopment of a twenty acre section of the downtown portion of the city including the 100, 200 and 300 blocks on the North side of West High Street. The Secretary of Housing and Urban Development (HUD) approved the plan and authorized federal funding of the Project under a Loan and Capital Grant Contract dated June 7, 1966, under which the Agency has received and expended, currently holds and will be entitled to receive and expend federal funds in the future in the implementation of the Project. The original Project failed to note the presence and significance of certain known historical buildings located on the above-cited blocks. The Project was amended by the Agency in July 1968 so as to provide for location on the 200 block of West High Street a proposed Civic Center but again the Project plan failed to note the existence or significance of the historical buildings on that site although such information was called to its attention in formal meetings and otherwise. The Agency again amended its Project plan in January 1969 and provided for relocation of the Civic Center to another site and redesignation of the redevelopment use of the South one-half of the 200 block on West High Street for commercial development or in the alternative for historic preservation.

13. The Agency acquired seven of the historic buildings all located on the South one-half of the 200 block of West High Street by February 1969 for approximately $131,000 and in May 1969 promulgated its Land Disposal Plan under which the parcels were to be advertised and sold as consolidated to redevelopers which plan HUD approved. The historic sites and other parcels on the 200 block of West High Street were publicly advertised for sale by Invitation

for Proposals on Block 5 Parcel 3 published on May 9, 1969, and the competitive proposals were to be opened before the Agency on June 10, 1969. The Bank submitted a proposal whereby it would acquire the land and, utilizing substantially the entire block, construct thereon a multi-story commercial building. A Proposal that the Agency and City restore the buildings was submitted by a historic preservation group. The Agency and the Bank executed a Contract for Sale of Land for Private Redevelopment on July 9, 1969, selling Block 5 Parcel 3 to the Bank but requiring the Agency to clear the land. Thereafter, on July 10, 1969, the two proposals were formally opened before the Agency. By a formal vote taken on July 18, the Agency accepted the proposal submitted by the Bank. This action HUD approved on July 29, 1969. The Agency delivered its deed conveying the land to the Bank on October 1, 1969. The Agency advertised for demolition bids on the land and accepted the bid of Norwood Construction Company on October 14, 1969, and on October 15, 1969, the parties executed a demolition contract which HUD approved on October 20, 1969. The Agency on October 15, 1969, instructed the Contractor to destroy the buildings immediately. Upon completion of demolition the Contractor will be entitled to be paid $6,428.00 from Agency funds. All these proceedings and actions described in Paragraph 4(b) were undertaken by the Defendants without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966, P.L. 89-665 or with the 1966 Amendments to the Housing Act of 1949.

14. Plaintiff is informed and believes and therefore alleges that the Defendants well knew of the existence and significance of the historic buildings when the Project plan was first submitted and approved in 1966 amended in 1968 and in 1969, and at the time the proposal by the Bank was accepted, and was on actual and official notice of the existence of the registered Historic District before the demoli-

tion bid was accepted and approved, yet throughout they failed and refused sufficiently to describe or note the significance of the historic buildings and Historic District on the appropriate Project documents and maps or to file accurate and complete updated documents and maps noting the existence of the Historic District, and in divers ways affirmatively concealed from the public the fact that a Historic District containing registered buildings would be destroyed by the proposed redevelopment of the 200 block of West High Street by a private redeveloper. Specifically, during the period from December 1965 through October 14, 1969, these Plaintiffs and the public were led to believe by the Agency, its members and Director, that the historic buildings would not be demolished but instead would be restored on their sites or moved to another location and restored and this impression was effectuated by means of Agency meetings held without public notice and informal, special and call meetings at which actions relating to the destruction of the historic buildings were taken without public participation. The second amendment to the Project plan stated the buildings would be preserved on their sites and the Agency resolution accepting the Bank's proposal expressly provided for moving the buildings to another location for restoration. Further, Plaintiff is informed and believes and therefore alleges that selection of the redevelopment proposal of the Bank was accomplished by the Agency in an arbitrary, capricious and biased proceeding.

15. Plaintiff made oral complaint of the proposed destruction of the Historic District to the Atlanta Regional Director of HUD on October 8, 1969, who failed and refused to act. By formal written complaint letter on October 9, 1969, Plaintiff informed the Secretary of the facts and called upon him to act to forestall acceptance of the demolition bids, withdraw his approval of the Project plan regarding the lands herein and to refer the matter to the Advisory Council on Historic Preservation under the National His-

toric Preservation Act of 1966. The Secretary failed and refused to act. Plaintiffs and other members of the class appeared before the Agency at its meeting on October 14, 1969, where they stated the facts concerning the Historic District and remonstrated and called upon the Agency to delay taking action on the demolition bids, correct their Project plan and refer the matter to HUD for comment by the Advisory Council under the National Historic Preservation Act of 1966. The Agency declined so to act and accepted the bid of the Contractor, ordering immediate demolition of the buildings.

16. At its meeting on October 14, 1969, upon the request of Plaintiff—the Agency agreed and directed its Director, Jennie Bryant, to notify these Plaintiffs prior to commencement of demolition and on October 15, 1969, the attorney for the Agency was informed of Plaintiffs preparation of this action and intent to file it promptly and in response to query informed these Plaintiffs that the demolition contract had not been formally executed at that time and demolition would likely not commence prior to October 17, 1969. Plaintiff is informed and believes and therefore alleges that at approximately 6:00 p.m. on October 15, 1969, defendant Jennie Bryant hand carried the demolition contract to the residence of defendant J. Norwood Hodge where he executed it and gave orders to his corporate agents to proceed with demolition that night despite the fact no demolition permit for destruction of the buildings had been obtained from the City of Lexington. At approximately 9:00 p.m., October 15, 1969, the bulldozers of defendant Norwood Construction Company began demolition of the building located at 215 West High Street, which is listed on the National Register. Demolition was halted at approximately 9:45 p.m. that night upon the request of the Lexington City Manager. The next morning on October 16, 1969, at 8:30 a.m. demolition was resumed and at the same time Plaintiff filed an action against the local and

private Defendants in the Circuit Court of Fayette County and obtained a temporary restraining order against them which was served on Defendant J. Norwood Hodge at the demolition site at approximately 10:45 a.m., October 16, 1969, but not before one Registered building was substantially destroyed and two other buildings in the Historic District damaged, one irreparably. The Fayette Circuit Court restraining order was dissolved upon the institution of this action.

17. The State Liaison Officer for Historic Preservation on October 20, 1969, requested the Advisory Council for Historic Preservation to investigate, consider and comment to HUD and the Agency concerning the matter herein, and to make recommendations for preserving the historical significance of the West High Street area. The Advisory Council has not yet acted.

18. Unless the private and local Defendants are temporarily enjoined and restrained from the commission of the acts threatened by them as above set forth and the federal and local Defendants be ordered to perform their duties under federal law the Plaintiffs will suffer great and irreparable damage, in that unique buildings registered on the National Register of Historic Buildings will be destroyed by the illegal acts of the Defendants and their federal claim rendered moot.

19. The Defendants and the public will not suffer loss caused by delay in demolition of the buildings above described.

FIRST CLAIM FOR RELIEF.

Plaintiff joins as parties defendant for purposes of obtaining specific relief under its First Claim for Relief the Secretary of Housing and Urban Development and joins the remaining named defendants in aid of the jurisdiction of the Court under 28 U.S.C. 1651, and in order that they may be heard on these issues. Paragraphs 1-19 of this com-

plaint are incorporated by reference into this First Claim for Relief.

FIRST COUNT.

The Secretary of HUD violated the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he approved the contract for Disposition of Land to Private Redeveloper and the Demolition Contract entailing destruction of the Historic District after being put on notice by the Agency's Second Amendatory Project Report, the Federal Register and Plaintiff's complaint letter that the buildings were listed as a Historic District on the National Register of Historic Places and thereby approved expenditure of federal funds without taking into account the effect of Project Ky. R-63 on said Historic District.

SECOND COUNT.

The Secretary of Housing and Urban Development has violated the provisions of the National Historic Preservation Act of 1966 by his approval of the Urban Renewal Project and amendments thereto and Land Disposal Agreement executed by and between the Agency and the Bank without complying with the provisions of Section 106 of the National Historic Preservation Act of 1966 in that he failed to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the impending effect of a federally-assisted urban renewal undertaking upon historic buildings listed on the National Register; and he will continue and compound said violation by failing and refusing to withdraw his approval and to withhold, recover or restrict federal funds previously authorized or disbursed by him to the Agency which will be used to demolish and raze the buildings in controversy.

THIRD COUNT.

The Secretary of Housing and Urban Development has violated the Housing Act of 1949, and the regulations

promulgated thereunder, and, specifically, 42 U.S.C. 1460 (c)(4) by approving the Project Ky. R-63 and amendments thereof and the land disposal agreement by and between the Agency and the Bank wherein the lands in controversy will be acquired by a private redeveloper for a sale price equal to approximately fifty percent (50%) of the fair market value of the land in violation of 42 U.S.C. §1460 (c)(4) and Part 14, ch 1, § 1, p. 1 (7-12-62), Urban Renewal Manual, Policies and Requirements for Local Public Agencies, U.S. Housing and Home Finance Agency, Urban Renewal Administration.

FOURTH COUNT.

The Secretary of HUD has violated the Housing Act of 1949, as amended, by approving the land disposal plan of the Agency which plan adopted an unauthorized method of disposal of property acquired by the Agency, to wit: the setting of a pre-determined fixed price for property below fair market value against which both private commercial developers and public and quasi-public developers were to submit competitive land-use plans and bids. The said method of property disposal is not authorized by the Housing Act of 1949, as amended, and is in direct contravention of the express policy of the Act, as expressed in 42 U.S.C. §1457 and numerous other sections of the Act and regulations to allow disposition of property below fair market value only in the case of developments for public housing or low income housing.

FIFTH COUNT.

The Secretary of HUD violated 42 U.S.C. §1460(b) (c) and 42 U.S.C. §1451(c) and 42 U.S.C. §1460(c)(10) by failing to require the Agency to submit and to update an urban renewal plan embodying a workable program for community improvement which is of sufficient scope and content to furinsh a basis for evaluation of need for the destruction

of the Historic District and which is and remains sufficiently complete to indicate, historic and architectural preservation within the urban renewal area encompassing West High Street and by failing to determine prior to giving his approval that the objectives of the urban renewal plan could not be achieved through rehabilitation of the south one-half of the 200 block on West High Street under the second Amendatory Project Report. Specifically, the Secretary failed to require the Agency to complete its plan at the time of its last amendment in February 1969 regarding utilization of the south one-half of the north side of West High Street and at the time HUD was asked to approve the acceptance by the Agency of the proposal submitted by the Bank on July 18, 1969, or at the time HUD was asked to approve acceptance of the demolition contract bid by Norwood Construction Company on October 14, 1969.

SECOND CLAIM FOR RELIEF.

For the purpose of stating the Second Claim for Relief, Plaintiff joins all the defendants to this action, i.e., federal, local, and private defendants and asserts the claim for relief against all of them as arising under the Constitution and laws of the United States and the Commonwealth of Kentucky. Paragraphs 1-19 are hereby incorporated by reference.

FIRST COUNT.

The federal and local defendants violated their federal and state duties under the applicable statutes and the regulations adopted pursuant thereto by failing to comply with the provisions of section 106 of the National Historic Preservation Act of 1966 and the 1966 Amendments to the Housing Act of 1949; by failing to update sufficiently and to supply timely Project plan information concerning the Project to the public and to the federal defendants concerning the historic nature of the buildings in controversy as required by 42 U.S.C. §1456(h); and by failing to require and de-

velop criteria and conditions which would require or encourage rehabilitation, restoration or preservation of the buildings as required by 42 U.S.C. §1460(c); and by adopting land disposal methods not authorized by law and disposing of the land in an illegal manner under Urban Renewal Manual 14-1-1 (7-12-62) and KRS 99.350(7) and 99.360; and regarding all such undertakings acted arbitrarily and capriciously in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

SECOND COUNT.

The defendants have violated Plaintiff's rights under the above-cited sections by entering into and performing contracts which require the destruction of the buildings, under circumstances in which the defendants had constructive and, in the alternative, actual knowledge that the contracts were being executed in violation of state and federal law. The private defendants have acted and propose and continue to act as agents for the local and federal defendants in completing the land disposal and demolition undertaking herein thereby destroying the jurisdiction of this Court and rendering Plaintiff's federal claims herein moot unless restrained.

THIRD COUNT.

The federal and local defendants violated Plaintiffs rights under the Fifth and Fourteenth Amendments to the United States Constitution by failing to promulgate the requisite rules, regulations, guidelines, by-laws, or contract provisions, convenants or conditions pursuant to their respective authority under the Housing Act of 1949, as amended, § 1456(7) and KRS 99.360(b), establishing procedures regarding the conduct of administrative proceedings under these statutes which will satisfy the requirements of administrative due process under the Fifth and Fourteenth Amendments to the United States Constitution;

specifically, the Agency amended its bylaws at a meeting without notice to authorize future meetings without notice to the public and thereafter conducted informal special and regular meetings without notice at which administrative decisions were made and formal action taken regarding matters bearing on destruction of the historic buildings here in controversy.

FOURTH COUNT.

The local Defendants violated Plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by making administrative decisions regarding the urban renewal plan and amendments, the land disposal method and contracts and the demolition contract without sufficient evidence and as a biased panel and without giving these Plaintiffs and the public a reasonable opportunity to be heard for the reason that meetings relating to the matters in controversy were held without notice to these Plaintiffs and the public in violation of Urban Renewal Manual, Policies and Requirements for Local Public Agencies, Ch. 1, § 1, (7-12-62); and decisions were made regarding demolition without knowledge of or without considering information necessary to an objective and informed decision; and that some members of the Agency who had or anticipated having private financial interests in property located in the urban development area under KRS 99.350(7) may have acted with bias of personal interest which tended directly or indirectly to substantially affect the outcome of the administrative decision being made.

RELIEF.

Wherefore: The Plaintiffs demand:

That the Court issue a preliminary injunction and a permanent injunction without bond against the federal defendants enjoining them to take all necessary steps; including withdrawal of prior approval of the Lexington Urban

Renewal Project Ky. R-63 as amended or parts thereof and withholding of federal funds from the Project in order to prevent the demolition, removal or other destruction of the fourteen historic buildings located in 100, 200, 300 blocks on West High Street, Lexington, Kentucky, until such time as the Court shall later determine that they have complied with federal law.

That the Court issue a preliminary injunction and permanent injunction, without bond restraining the federal and local defendants from taking any steps to demolish or remove the buildings in controversy, and ordering the local defendants to take whatever affirmative steps are necessary and within their power to prevent the private defendants from carrying out the same acts.

That the Court issue a preliminary injunction and permanent injunction restraining the private defendants from demolishing, destroying or removing the buildings in controversy.

That the Court declare the rights of the parties and reform or set aside the contracts, deeds and agreements between the federal and local defendants and the private defendants relating to the destruction of the Historic District on West High Street; that the Court order the defendants to reconstruct and repair the registered buildings previously demolished or damaged; that the Court order the federal defendant to refer the matter to the Advisory Council on Historic Preservation for comment and for recommendations regarding continuing protection and preservation of the Historic District; and

That the Court declare that the Plaintiffs have rights arising under the National Historic Preservation Act and the National Housing Act as amended in 1966, and that the Court issue a mandamus against the Secretary of Housing and Urban Development ordering him to do his duties under those Acts,

That the Court grant judicial review of the Agency action taken by the United States Department of Housing and Urban Development and the Urban Renewal and Community Development Agency of Lexington, undertaking to demolish buildings registered on the National Register of Historic Places,

That the Court grant all other appropriate relief to which the Plaintiffs may be entitled.

(s) Roger B. Sledd,
Attorney for the Plaintiffs,
1404 First Security National
Bank Building,
Lexington, Kentucky.

CERTIFICATE OF SERVICE.

I, Roger B. Sledd, attorney for the plaintiffs in the above entitled action, hereby certify that on the 28th day of October, 1969, I served the attached Amended Complaint And Motion For Preliminary Injunction upon: the attorneys for the defendants:

Mr. Montjoy Trimble,
Kincaid, Wilson, Schaeffer, Trimble,
& Hembree,
500 Central Bank Building,
Lexington, Kentucky,

Mr. A. Gene Oliver,
Strother, Oliver & Strother,
Citizens Union Bank Building,
Lexington, Kentucky,

Mr. Richard Smith,
Acting City Manager and Corporation Counsel,
City Manager's Office,
Municipal Building,
Lexington, Kentucky,

Mr. George Cline,
United States District Attorney for
the Eastern District of Kentucky,
Federal Post Office Building,
Lexington, Kentucky,

by leaving copies at their offices above designed with their clerks or other person in charge thereof; and on October 28, 1969 by depositing a copy in the United States mails, air mail postpaid addressed to George Romney, Secretary, United States Department of Housing and Urban Development, 451 Seventh Street, S. W., Washington, D. C. 20410.

(s) Roger B. Sledd,
Attorney for the Plaintiffs,
1404 First Security National
Bank Building,
Lexington, Kentucky.

APPENDIX "G"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development, et al., - - - - - - - - *Defendants.*

ANSWER OF CERTAIN DEFENDANTS.

Come the Defendants, City of Lexington, Kentucky, a municipal corporation, Charles Wylie, Joseph Graves, Harry Sykes, Thomas Underwood, Fred Fugazzi, Urban Renewal and Community Development Agency of the City of Lexington, a municipal corporation, Robert E. Featherston, William R. Embry, Bryon Romanowitz, D. C. Noble, H. J. Hagler, Jennie Bryant, Citizens Union National Bank and Trust Company, Inc., a national banking corporation, Norwood Construction Company, Inc., a Kentucky corporation, and J. Norwood Hodge (hereinafter sometimes referred to as "these Defendants"), and for their answer to the Complaint as amended of the Plaintiffs, state as follows:

FIRST DEFENSE.

The Complaint as amended fails to state a claim upon which relief can be granted against these Defendants.

SECOND DEFENSE.

The Plaintiffs are not real parties in interest and have no standing or capacity to bring this action.

THIRD DEFENSE.

This Court lacks jurisdiction because it appears on the face of the Complaint as amended that the Plaintiffs state no claim against these Defendants under the Constitution, laws or treaties of the United States of America.

FOURTH DEFENSE.

The matter in controversy does not exceed the sum or value of $10,000.00, exclusive of interest and costs.

FIFTH DEFENSE.

All matters and issues involved in this matter are involved in and have been determined by the proceedings in the action styled *South Hill Neighborhood Association, Inc., et al.* v. *Urban Renewal and Community Development Agency of the City of Lexington, et al.*, heretofore pending in the Fayette Circuit Court of Kentucky, First Division, as Civil Action 25992, at the time this action was commenced in this Court, and now pending in the Court of Appeals of Kentucky as *South Hill Neighborhood Association, Inc., and Curtis Harrison, Appellants* v. *Urban Renewal and Community Development Agency of the City of Lexington, et al., Appellees.*

SIXTH DEFENSE.

The Plaintiffs are guilty of laches, waiver, and are estopped from enforcing any rights or remedies that they may or might have under law.

SEVENTH DEFENSE.

1. These Defendants deny the averments contained in Paragraph 1 of the Complaint as amended.

2. The Defendants admit the averment in Paragraph 2 of the Complaint as amended that South Hill Neighborhood Association, Inc. is a nonprofit membership association incorporated under KRS Chapter 273 with offices in Lexington, Kentucky. The Plaintiffs deny each and every other averment contained in Paragraph 2 of the Complaint as amended.

3. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 3 of the Complaint as amended.

4. These Defendants admit the averment contained in Paragraph 4 of the Complaint as amended that Curtis Harrison resides at and owns property located at 341 Madison Place, Lexington, Kentucky. These Defendants deny each and every other averment contained in Paragraph 4 of the Complaint as amended.

5. These Defendants admit the averments contained in Paragraph 5 of the Complaint as amended.

6. These Defendants admit the averments contained in Paragraph 6 of the Complaint as amended.

7. These Defendants deny the averments contained in Paragraph 7 of the Complaint as amended.

8. These Defendants admit the averments contained in Paragraph 8 of the Complaint as amended.

9. These Defendants admit the averments contained in Paragraph 9 of the Complaint as amended.

10. These Defendants admit the averments contained in Paragraph 10 of the Complaint as amended.

11. These Defendants admit the averments contained in Paragraph 11 of the Complaint as amended that:

(a) The buildings were accepted by the Keeper of the National Registry for Historic Places and listed as the West High Street Historic District on the National Register on July 10, 1969, and

(b) Official notice thereof was published in the Federal Register on August 5, 1969.

These Defendants deny each and every other averment contained in Paragraph 11 of the Complaint as amended. By way of further answer to Paragraph 11 of the Complaint as amended, these Defendants believe and therefore aver and allege that the registration of the West High Street Historic District on the National Registry for Historic Places was illegal in that such registration did not comply with the laws and regulations of the United States of America applicable thereto.

12. These Defendants admit the averments contained in Paragraph 12 of the Complaint as amended that:

(a) The agency promulgated its Urban Renewal Area Project, Ky. R-63 in December, 1965, providing for redevelopment of a twenty-acre section of the downtown portion of the City of Lexington, including the 100, 200 and 300 blocks on the north side of West High Street,

(b) The Secretary of Housing and Urban Development approved the plan and authorized federal funding of the project under a Loan and Capital Grant Contract dated June 7, 1966, under which the Agency has received and expended federal funds,

(c) The Project was amended by the Agency in July of 1968, and

(d) The Agency again amended its Project Plan in January of 1969.

These Defendants deny each and every other averment contained in Paragraph 12 of the Complaint as amended. By way of further answer to Paragraph 12 of the Complaint as amended, these Defendants aver and allege that

the Secretary of Housing and Urban Development has approved the Plan dated December, 1965, the First Amended Plan dated July, 1968, and the Second Amended Plan dated January, 1969, that each and every Plan has called for the demolition and removal of the buildings located in the 100, 200 and 300 blocks on the north side of West High Street and that the Agency was under no legal or other obligation to note the existence of any so-called historical buildings on its Urban Renewal Plan.

13. These Defendants admit the averments contained in Paragraph 13 of the Complaint as amended that:

(a) The Agency acquired buildings all located on the north one-half of the 200 block of West High Street by February, 1969;

(b) Parcels on the 200 block of West High Street were publicly advertised for sale by invitation for proposals published on May 9, 1969;

(c) The bank submitted a proposal whereby it would acquire the land and construct thereon a multi-story commercial building to cost between $4,000,000.00 and $8,000,000.00;

(d) The contract for sale of land between the Agency and the bank requires the Agency to clear the land of all improvements;

(e) The Agency accepted the proposal submitted by the bank;

(f) The Agency advertised for demolition bids on the land and accepted the bid of Norwood Construction Company on or about October 14, 1969;

(g) On or about October 15, 1969, the Agency and Norwood Construction Company executed a demolition contract;

(h) On October 15, 1969, the Agency instructed Norwood Construction Company to destroy the buildings; and

(i) Upon completion of demolition of the buildings, Norwood Construction Company will be entitled to $6,428.00 from Agency funds.

These Defendants deny each and every other averment contained in Paragraph 13 of the Complaint as amended.

14. These Defendants deny each and every averment contained in Paragraph 14 of the Complaint as amended. By way of further answer to Paragraph 14 of the Complaint as amended, these Defendants deny that they were required by any law or regulation to describe or note the significance of any so-called historic buildings and historic districts or any project document or maps or to file any updated documents or maps noting the existence of any so-called historic district.

15. These Defendants admit the averment contained in Paragraph 15 of the Complaint as amended that by letter dated October 9, 1969, the Plaintiff, Curtis Harrison, complained to the Defendant, George Romney. A copy of the letter of Curtis Harrison dated October 9, 1969, is attached hereto and made a part hereof as Exhibit "A". These Defendants admit the averment contained in Paragraph 15 of the Complaint as amended that certain persons appeared before the Agency at its meeting on October 14, 1969, and that the Agency accepted the bid of the contractor for demolition of the buildings. These Defendants deny each and every other averment contained in Paragraph 15 of the Complaint as amended. By way of further defense to the averments contained in Paragraph 15 of the Complaint as amended, these Defendants allege that on or about October 14, 1969, Lawrence M. Cox, Assistant Secretary, Renewal and Housing Assistance, Housing and Urban Development, notified Curtis Harrison, President of South Hill Neighborhood Association, that:

"HUD has no authority to intercede in the execution of the downtown Urban Renewal Project. HUD

is *obligated* under a *Loan and Grant Contract* to finance the carrying out of the Urban Renewal Plan as amended. Once we are so obligated, we are no longer free to require changes in a project due to *subsequent* listings of historic properties on National Registry." (Emphasis added.)

A copy of the telegram of October 14, 1969, is attached hereto and made a part hereof as Exhibit "B".

16. These Defendants admit the averments contained in Paragraph 16 of the Complaint as amended that:

(a) At its meeting on October 14, 1969, the Defendant, Jennie Bryant, agreed to notify certain of the Plaintiffs prior to the commencement of demolition of the buildings;

(b) The Defendant, Jennie Bryant, carried the demolition contract to the residence of the Defendant, J. Norwood Hodge, where he executed the contract;

(c) At approximately 9:00 P.M., October 15, 1969, the Defendant, Norwood Construction Company, began demolition of certain of the buildings;

(d) Demolition was halted by the City Manager of the City of Lexington, Kentucky;

(e) On October 16, 1969, demolition was resumed; and

(f) Certain of the Plaintiffs filed an action against the local and private Defendants in the Fayette Circuit Court and obtained a temporary restraining order which was served on the Defendant, J. Norwood Hodge, on October 16, 1969.

These Defendants deny each and every other averment contained in Paragraph 16 of the Complaint as amended.

17. These Defendants deny the averments contained in Paragraph 17 of the Complaint as amended. By way of further defense to Paragraph 17 of the Complaint as

amended, these Defendants allege that on October 20, 1969, the State Liasion Officer of the Commonwealth of Kentucky for Historic Preservation sent a telegram to the National Advisory Council for Historic Preservation and that the State Liasion Officer sent copies of such telegram to Judge James Park, Jr., Judge, Fayette Circuit Court, Judge Mac Swinford, Judge, United States District Court, and to Eugene Mooney, Attorney for the Plaintiffs. On Sunday evening, October 19, 1969, Eugene Mooney, Attorney for the Plaintiffs, called the State Liasion Officer for Historic Preservation and *requested* the State Liasion Officer for Historic Preservation to send a telegram to Judge James Park, Jr., and Judge Mac Swinford. Eugene Mooney did not request the State Liasion Officer to mail a copy of that telegram to any of the counsel for these Defendants. The wording of the telegram from the State Liasion Officer to the National Advisory Council was suggested by counsel for the Plaintiffs, Eugene Mooney. These acts of counsel for the Plaintiffs were taken to improperly influence this Court and the Fayette Circuit Court which had coming before it, on the afternoon of October 20, 1969, Defendants' motions to dismiss the state court action then pending. At the hearing before the Fayette Circuit Court in the afternoon of October 20, 1969, counsel for the Plaintiffs did not disclose to the Fayette Circuit Court that the telegram of the State Liasion Officer to the Advisory Council had been sent at the request of and had been instigated by counsel for the Plaintiffs. Counsel for the Plaintiffs did not disclose to counsel for Defendants that such a telegram had been sent by the State Liasion Officer. The truth of the allegations of the Defendants herein is shown in the deposition of Frank J. Groschelle which has been filed in and has been made a part of these proceedings.

18. These Defendants deny the averments contained in Paragraph 18 of the Complaint as amended.

19. These Defendants deny the averments contained in Paragraph 19 of the Complaint as amended.

20. These Defendants deny the averments contained in the paragraph of the Complaint as amended styled "First Claim for Relief".

21. These Defendants deny the averments contained in the "First Count" of the Complaint as amended.

22. These Defendants deny the averments contained in the "Second Count" of the Complaint as amended.

23. These Defendants deny the averments contained in the "Third Count" of the Complaint as amended.

24. These Defendants deny the averments contained in the "Fourth Count" of the Complaint as amended. By way of further answer to the "Fourth Count" of the Complaint as amended, these Defendants allege that the Secretary of HUD approved the expenditure of federal funds for the demolition of the so-called historic buildings prior to their listing on the National Registry on July 10, 1969.

25. These Defendants deny the averments contained in the "Fifth Count" of the Complaint as amended.

26. These Defendants deny the averments contained in the paragraph of the Complaint as amended styled "Second Claim for Relief".

27. These Defendants deny the averments contained in the "First Count" of the "Second Claim for Relief" of the Complaint as amended.

28. These Defendants deny the averments contained in the "Second Count" of the "Second Claim for Relief" of the Complaint as amended.

29. These Defendants deny the averments of the "Third Count" of the "Second Claim for Relief" of the Complaint as amended.

30. These Defendants deny the averments of the "Fourth Count" of the "Second Claim for Relief" of the Complaint as amended.

WHEREFORE, these Defendants demand that:

1. The Complaint as amended be dismissed and held for naught with prejudice to the Plaintiffs,

2. For their costs herein expended.

3. For such other and further relief as may appear equitable and just.

Kincaid, Wilson, Schaeffer, Trimble & Hembree

By (s) J. Montjoy Trimble
Attorneys for the Defendants, City of Lexington, Kentucky, Charles Wylie, Joseph Graves, Harry Sykes, Thomas Underwood, Fred Fugazzzi, Urban Renewal and Community Development Agency of the City of Lexington, Robert E. Featherston, William R. Embry, Byron Romanowitz, D. C. Noble, H. J. Hagler, and Jennie Bryant.

Strother, Oliver & Strother
By (s) A. Gene Oliver
Attorneys for Defendant, Citizens Union National Bank and Trust Company, Inc.

Fowler, Rouse, Measle & Bell
By (s) Arthur B. Rouse, Jr.
Attorneys for Norwood Construction Company, Inc., and J. Norwood Hodge.

CERTIFICATE.

I certify that the foregoing Answer was served by mailing a true copy thereof to:

Mr. Eugene F. Mooney,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. John E. Kennedy,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. Robert G. Lawson,
University of Kentucky,
College of Law,
Lexington, Kentucky 40506,

Mr. Roger Sledd,
First National Bank Building,
Lexington, Kentucky 40507,
Attorneys for Plaintiffs.

and to:

Mr. George Cline,
United States District Attorney,
Federal Office Building,
Lexington, Kentucky 40507,
Attorney for the Defendant,
George Romney.

this the 6th day of November, 1969.

(s) J. Montjoy Trimble

APPENDIX "H"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

MEMORANDUM—Filed November 14, 1969.

Plaintiffs in this action allege that George Romney, Secretary of United States Department of Housing and Urban Development, failed to notify the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. 16 U.S.C. 470.

This case is before the court on plaintiffs' motion for a temporary injunction and defendants' motions to dismiss the complaint. A full disclosure and discussion of the parties and facts which led to this controversy are imperative to a ruling on these motions.

The parties to this action include: Plaintiffs (1) South Hill Neighborhood Association, Inc. (South Hill), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (2) The Bluegrass Trust for Historic Preservation, Inc. (Bluegrass Trust) a non-profit Kentucky corporation having as one of its pur-

poses the preservation of historical buildings; (3) Curtis Harrison, a citizen, taxpayer and President of South Hill; (4) Mrs. Stathis Kafoglis, a citizen, taxpayer and owner of property within the area in controversy; (5) Mr. and Mrs. W. T. Dennis, citizens, taxpayers and owners of property within the area in controversy; and Defendants (1) George Romney, Secretary of the United States Department of Housing and Urban Development (HUD); (2) The City of Lexington, Kentucky, a municipal corporation, duly organized and existing under the laws of the Commonwealth of Kentucky; (3) Honorable Charles Wylie, Mayor of Lexington, Kentucky; (4) The Board of City Commissioners of the City of Lexington, authorized city board for the City of Lexington; (5) Joseph Graves, Harry Sykes, Thomas Fugazzi, duly elected and qualified members of the Lexington Board of City Commissioners; (6) Urban Renewal and Community Development Agency of the City of Lexington (Lexington Urban Renewal Agency), a municipal corporation organized under and existing by virtue of the laws of the Commonwealth of Kentucky; (7) Robert E. Featherston, William R. Embry, Bryon Romanowitz, D. C. Noble and H. J. Hagler, duly appointed, qualified and acting members of the Lexington Urban Renewal Agency; (8) Jennie Bryant, Director of the Lexington Urban Renewal Agency; (9) Citizens Union National Bank and Trust Company, Inc. (Citizens Union Bank), a national banking corporation organized under and existing by virtue of the laws of the United States of America; (10) Norwood Construction Company, Inc. (Norwood Construction Co.), a Kentucky corporation; and (11) J. Norwood Hodge, President of Norwood Construction Co.

The facts out of which this controversy arises are as follows. The Lexington Urban Renewal Agency was formed in 1959 and has continued in existence to date. On April 1, 1965, the Board of City Commissioners of the City of Lex-

ington adopted an ordinance describing area in downtown Lexington to be appropriate for an urban renewal project. An urban renewal plan was promulgated for this area and said plan was approved by the Planning and Zoning Commission of Lexington-Fayette County at a public hearing on July 22, 1965. Notice of this plan was given to each property owner in the area bounded on the north by Main Street, on the west by Patterson Street, on the south by High Street, and on the east by Shreve Avenue. This includes the area in controversy. The method of financing costs for this project was authorized by the Kentucky Court of Appeals on October 1, 1965. See Watkins v. Fugazzi, 394 S. W. 2d 594 (Ky. 1965).

The Lexington Urban Renewal Agency's plan, Ky. R-63, was submitted to the federal authorities on December 30, 1965. On June 7, 1966, HUD approved the December, 1965, plan and authorized federal funding under a Loan and Capital Grant Contract. This plan provided that all land in the project area would be used for commercial purposes and that all land acquired would be cleared of all improvements. On October 19, 1967, the City of Lexington sold $3,500,000.00 of revenue bonds to finance its portion of the cost of the urban renewal project.

On July 22, 1968, the plan for the Lexington urban renewal project, R-63, was amended. This amendment to the 1965 plan provided for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and provided for an alternative use of historic preservation in the north half of the 200 block of West High Street. Seven of the buildings involved in this action are in the area with historic preservation designated as an alternate use. Any plan submitted for historic preservation was to meet standards which were explained at public meetings. If the buildings were not restored, they were to be demolished. HUD approved this first amendment on October 18, 1968.

In January, 1969, the urban renewal plan, Ky. R-63, was again amended by Lexington Urban Renewal Agency. This amendment provided for an increased expenditure of federal funds, a change in alignment of streets in the area. This amendment retained, however, the alternative use for historic preservation as contained in the July, 1968, plan and amendment. HUD approved this second amendment on May 8, 1969.

On May 9, 1969, and June 29, 1969, public advertisements appeared in newspapers inviting competitive proposals to be submitted for part of the land contained in the urban renewal plan, R-63. These proposals were formally opened before the Lexington Urban Renewal Agency on July 10, 1969. Two proposals were submitted at this time. One was from Citizens Union Bank and proposed construction of a $4,000,000.00 to $8,000,000.00 multi-story bank and office building which would ultimately employ one thousand persons. This proposal was determined by the Lexington Urban Renewal Agency to comply with their requirements. The other proposal came from Historic Lexington, Inc. (not a party to this action but of a class which plaintiffs purport to represent). Historic Lexington, Inc.'s proposal was for restoration of the buildings in this area. This proposal was determined by the Lexington Urban Renewal Agency to not be in compliance with their requirements. Historic Lexington, Inc. was notified of the plan's deficiencies and was given an opportunity to correct. Such corrections were not made.

Fourteen buildings in the Lexington urban renewal area were denominated "West High Street Historic District" and on July 10, 1969, were placed on the National Register of historical places. 16 U.S.C. 470. Official notice of this listing appeared on August 5, 1969 in 34 Federal Register.

On July 18, 1969, the Lexington Urban Renewal Agency voted to accept the proposal submitted on July 10, 1969, by the Citizens Union Bank. On July 29, 1969, the regional

HUD director notified the Lexington Urban Renewal Agency that he had "no objection to a disposal to the proposed redeveloper." Exhibit 11 of October 28, 1969, deposition of Jennie F. Bryant. The proposal of the Citizens Union Bank was accepted by the Lexington Urban Renewal Agency on September 3, 1969, and on that date a contract was entered into between the parties. The contract required the land to be cleared of all improvements. The deed to the property was tendered on October 1, 1969.

In September, 1969, the Lexington Urban Renewal Agency had advertised for demolition bids for buildings on the property sold to Citizens Union Bank. On October 14, 1969, Jennie Bryant, director of Lexington Urban Renewal Agency, received verbal approval from HUD for demolition of the seven buildings on the 200 block of High Street by Norwood Construction Co. That same day the demolition bid of Norwood Construction Co. was accepted. The demolition contract was entered into between the parties on October 15, 1969. During the evening of October 15, 1969, and the morning of October 16, 1969, demolition was begun on the buildings. This demolition completely destroyed one building and damaged two others.

Court action on this controversy has been in the Fayette County Circuit Court and this court. On October 16, 1969, substantially the same plaintiffs commenced action against substantially the same defendants, with the exception of George Romney. A temporary restraining order was issued to prohibit further demolition of the buildings by Norwood Construction Co. Judge Park of the Fayette Circuit Court on October 21, 1969, entered findings of fact and conclusions of law which dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted. In dismissing the complaint and dissolving the restraining order, Judge Park said "this is a final judgment insofar as the plaintiffs' cause of action is concerned." South Hill Association, Inc. et al. v. Urban Renewal and Community

Development Agency of the City of Lexington, et al., Fayette Circuit Court First Division No. 25992, Judgment of October 21, 1969. On October 22, 1969, the Kentucky Court of Appeals, sitting en banc, overruled plaintiffs' motion for interlocutory injunctive relief pending appeal.

Action was commenced in this court on October 17, 1969. A temporary restraining order was issued by this court on October 23, 1969, and a hearing was held October 31, 1969. At this hearing it was ordered that the parties enter findings of fact and conclusions of law from which this court could enter a judgment. Federal Rules of Civil Procedure 52. This has been done.

Relief requested in plaintiffs' amended complaint seeks: (1) a preliminary injunction and a permanent injunction without bond—a) against federal defendants enjoining them, including withdrawal of prior approval of funds, to remove or destroy the fourteen buildings in question until the court shall determine they have complied with federal law; b) to restrain federal and local defendants from taking steps to demolish or remove buildings in controversy, including affirmative orders to prevent private defendants from carrying out acts; c) to restrain private defendants from demolishing, destroying, or removing said building; (2) a declaration of rights among parties and reformation of contracts, deeds and agreements relating to destruction of buildings; (3) an order for defendants to reconstruct and repair damaged buildings; (4) an order for federal defendant to refer the matter to Advisory Council on Historic Preservation for comment and for recommendations; (5) court declaration that plaintiffs have rights arising under National Historic Preservation Act and National Housing Act and for court to issue mandamus against federal defendant ordering him to do his duties under the Act; (6) a grant of judicial review of action taken by HUD and Lexington Urban Renewal Agency in undertaking to demolish

said buildings; and, (7) all other appropriate relief to which the plaintiffs may be entitled.

The defendant, George Romney (HUD), has moved to dismiss the complaint on the grounds that: (1) plaintiffs lack standing to sue; (2) defendant has no authority over demolition; and, (3) plaintiffs have no right to a hearing.

The remaining defendants move to dismiss plaintiffs' complaint on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that plaintiffs are not real parties in interest and have no standing or capacity to bring this action; (3) that this court lacks jurisdiction because it appears on the face of the complaint that plaintiffs state no claim under the Constitution, Laws or Treaties of the United States; (4) that all matters and issues herein involved have been fully determined by the proceedings in state court; and, (5) that the plaintiffs are guilty of laches, waiver and are estopped from enforcing any right or remedies they may have under law.

Plaintiffs attempt to invoke the jurisdiction of this court under 28 U.S.C. 1331(a) by alleging that the amount in controversy exclusive of interest and costs exceeds $10,000 and that the claim arises under the Constitution, law or treaties of the United States. More specifically plaintiffs allege their claims arise under the National Historic Preservation Act of 1966, 16 U.S.C. 470f; the Housing Act of 1949 as amended, 42 U.S.C. 1451(c), (e), 1455(e), 1456(c)(6), (7), 1460(c); the Administrative Procedures Act, 5 U.S.C. 702, 703; 28 U.S.C. 1361; and 28 U.S.C. 1651.

In 1966, Congress enacted the National Historic Preservation Act. 16 U.S.C. 470 *et seq.* Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical and cultural foundations of the Nation should be preserved.

. . ." 16 U.S.C. 470(a), (b). To implement this policy, Congress provided in 16 U.S.C. 470f that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any . . . building, structure, or object that is included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Congress amended the National Housing Act of 1949 so that it would be compatible with the National Historic Preservation Act. See 42 U.S.C. 1460(b)(2), 1460(c)(6), 1460(c)(9), 1460(c)(10).

In maintaining this action plaintiffs seek to couple the before described policy of historic preservation with 5 U.S.C. 702, 703, 28 U.S.C. 1361 and 28 U.S.C. 1651. The Administrative Procedures Act 5 U.S.C. 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. 703 of the same Act provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory in-

junction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

28 U.S.C. 1361 provides:

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under 28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1651. Plaintiffs further contend that the action of HUD would be reviewable under the Administrative Procedures Act. 5 U.S.C. 701 *et seq.*

Defendants deny these allegations and move the court to dismiss the complaint for the reason that plaintiffs lack

standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. Supra at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers.

It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. The Lexington Urban Renewal Agency had acquired title to these buildings in February, 1969, and the buildings were placed on the Register in July, 1969. None of the plaintiffs, though informed of the urban renewal plan's alternate use for historic preservation, submitted a proposal for development of the area. The plaintiffs' interest in the litigation is not sufficient to give them standing to bring a mandamus action under 28 U.S.C. 1361, an injunction under 28 U.S.C. 1651, or court review of administrative action 5 U.S.C. 701 *et seq.* They do not have a personal stake in the outcome. Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 927 (2 Cir. 1968).

Any attempt to gain standing plaintiffs seek under the "private attorney general" doctrine must also fail. This doctrine as developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir. 1965); Office of Communication of United Church of Christ v. Federal Communication Commission, 359 F. 2d 994 (D.C.

Cir. 1966); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); and Road Review Leage v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967) seems to stand for the proposition that persons or groups who by their activities and conduct have exhibited a special intefest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.

Such a doctrine provides standing under two circumstances: (1) when the plaintiffs are citizens of the area and their direct interests are to be affected, see Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, supra; and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest in the area in controversy. Scenic Hudson Preservation Conference v. Federal Power Commission, supra; Road Review League v. Boyd, supra.

Plaintiffs in this action have met neither standard. Those plaintiffs who are citizens of the area, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, have no interest in the seven buildings to be demolished in the 200 block of West High Street. The National Register for historic buildings has been in existence since 1966. Not until July 10, 1969, however, were any of these buildings placed on the Register. The Lexington urban renewal plan, since July, 1968, has provided an alternative use for historic preservation. None of the plaintiffs, however, have submitted such a plan. The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the controversy so as to be included among those parties aggrieved or adversely affected by agency action. See Green Street

Association v. Daley, 373 F. 2d 1 (7 Cir. 1967); Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, 310 F. 2d 99 (7 Cir. 1962); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N.D. Ill. 1968).

It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington urban renewal plan, Ky. R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a "Loan and Capital Grant Contract" was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for historic places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and bids for the property in question. These bids were to be

submited July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in Kent County Council for Historic Preservation v. George W. Romney, Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties.

It is the opinion of this court: (1) that the Temporary Restraining Order Entered on October 22, 1969, should be dissolved; (2) that the plaintiffs' motion for temporary injunction should be overruled, Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied, 390 U. S. 921 (1968); Barron & Holtzoff § 1433; and, (3) that the motions to dismiss by all defendants should be sustained.

An order in accordance with this motion is this day entered.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "I"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., - - - - - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

ORDER—Entered and Filed November 14, 1969.

It is the Judgment of this court and is hereby ordered that:

(1) the Temporary Restraining Order heretofore issued by this court be dissolved upon entry of this Order;

(2) the plaintiffs' Motion for a Temporary Injunction is overruled; and

(3) the defendants' motion to dismiss be sustained and the Complaint as amended be dismissed.

See memorandum.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "J"

No. 19, 995

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; THE BLUEGRASS TRUST FOR HISTORIC PRESERVATION, INC., a nonprofit incorporated association of the Commonwealth of Kentucky; CURTIS HARRISON; MRS. STATHIS KAFOGLIS; MR. & MRS. W. T. DENNIS; on behalf of themselves and all other United States or Kentucky citizens, taxpayers, property owners, or historic preservation groups and persons similarly situated, - - - - - *Appellants,*

v.

GEORGE ROMNEY, Secretary of the United States Department of Housing and Urban Development,

THE CITY OF LEXINGTON, KENTUCKY; HONORABLE CHARLES WYLIE, Mayor of the City of Lexington; THE BOARD OF CITY COMMISSIONERS OF THE CITY OF LEXINGTON; JOSEPH GRAVES, Member of the Board; HARRY SYKES, Member of the Board; THOMAS UNDERWOOD, Member of the Board; FRED FUGAZZI, Member of the Board; URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF LEXINGTON, a municipal corporation; ROBERT E. FEATHERSTON, Chairman; WILLIAM R. EMBRY, Vice-Chairman; BYRON ROMAN-

owitz, Member; D. C. Noble, Member; H. J. Hagler, Member; Jennie Bryant, Director of the Urban Renewal and Community Development Agency of the City of Lexington,

Citizens Union National Bank and Trust Company, Inc., a Kentucky corporation; Norwood Construction Company, Inc., a Kentucky corporation; J. Norwood Hodge, President of Norwood Construction Company, - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

OPINION—Decided and Filed November 24, 1969.

Before: Phillips, Chief Judge, and Peck and Combs, Circuit Judges.

Per Curiam. The subject matter of this action, which has come on for consideration by this panel at the direction of the Chief Judge, has been the core of a controversy which has seen the parties at odds in both administrative and judicial proceedings. The latter have included an action in the courts of the Commonwealth of Kentucky with review by its Court of Appeals, sitting en banc, with negative results to the plaintiffs, and an action with a similar conclusion in the District Court, from which the present appeal was perfected.

The ultimate aim of the plaintiffs is the protection from demolition of fourteen buildings, claimed to be of historic significance, which stand in an area designated for improvement under the Urban Renewal Plan of the City of Lexington, Kentucky, all as appearing in detail in the documents before us, as will be later herein commented upon.

The matter is before this Court for consideration of certain motions, the first of which is the plaintiffs-appellants'

Motion for Injunction Pending Appeal. Subsequent motions include defendants-appellees' Motion to Require Plaintiffs to File Bond, which will not herein be considered for reasons which will be later apparent, and the motion of certain appellees for an order denying injunctive relief pending appeal. We choose to and will consider the latter motion as a motion to affirm the judgment of the District Court and as having been filed under the provisions of Rule 8(b) of the Rules of this Court.* The propriety of such consideration as well as the fact that appellants have been apprised of such nature of the motion will readily appear from Branch (2) of the motion and from the conclusion of the memorandum in support thereof wherein "it is respectfully concluded that this court should deny the injunctive relief requested by the Appellants *and affirm the Order of the District Court.* . . ." (Emphasis supplied.) Responsive to our requests, counsel have with expedition and obvious diligence favored us with exhaustive briefs which have been most helpful in acquainting the Court with the facts and offering citations to applicable legal principles. Without implying criticism but rather to illustrate the breadth of the factual presentation before us, we observe that the briefs, perhaps particularly those of the appellants, go occasionally outside the record, and offer averments not otherwise evidenced. To the extent that they are germane to our consideration, however, all uncontroverted representations have been taken into account.

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*Rule 8—MOTION TO DISMISS OR AFFIRM. Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. . . .

"(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . . ."

We thus note the contention of the appellees in the motion we consider as one to affirm to the effect that "unless this appeal is fully and finally disposed of prior to November 28, 1969, the Urban Renewal Plan of the City of Lexington, Kentucky, will be placed in grave jeopardy and probably destroyed."

The Order from which this appeal was perfected was entered by Judge Mac Swinford in the United States District Court for the Eastern District of Kentucky, and was accompanied by an exhaustive Memorandum. Rather than restate, paraphrase or extensively quote from that Memorandum, due to the exigencies of time urged upon us by all parties, we attach Judge Swinford's Memorandum hereto as Appendix A. In addition to the authorities cited in that memorandum, reference is made to this Court's opinion in *Moist* v. *Belk*, 380 F. 2d 720, *cert. denied*, 389 U. S. 960 (1967). It is here determined that the District Court properly dissolved the Temporary Restraining Order previously entered by it, overruled the plaintiffs' Motion for a Temporary Injunction and sustained the defendants' Motion to Dismiss and dismissed the complaint as amended, and it is further here determined that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and that therefore the motion to affirm is well taken and should be sustained.

The judgment of the District Court is affirmed.

APPENDIX A

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
Lexington
No. 2080

South Hill Neighborhood Association, Inc., Et Al., - - - - - - - - Plaintiffs,

v.

George Romney, Et Al., - - - - Defendants.

MEMORANDUM.

Plaintiffs in this action allege that George Romney, Secretary of United States Department of Housing and Urban Development, failed to notify the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. 16 U.S.C. 470.

This case is before the court on plaintiffs' motion for a temporary injunction and defendants' motions to dismiss the complaint. A full disclosure and discussion of the parties and facts which led to this controversy are imperative to a ruling on these motions.

The parties to this action include: Plaintiffs (1) South Hill Neighborhood Association, Inc. (South Hill), a non-profit Kentucky corporation having as one of its purposes the preservation of historical buildings; (2) The Bluegrass Trust for Historic Preservation, Inc. (Bluegrass Trust) a non-profit Kentucky corporation having as one of its pur-

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The facts out of which this controversy arises are as follows. The Lexington Urban Renewal Agency was formed in 1959 and has continued in existence to date. On April 1, 1965, the Board of City Commissioners of the City of Lex-

ington adopted an ordinance describing area in downtown Lexington to be appropriate for an urban renewal project. An urban renewal plan was promulgated for this area and said plan was approved by the Planning and Zoning Commission of Lexington-Fayette County at a public hearing on July 22, 1965. Notice of this plan was given to each property owner in the area bounded on the north by Main Street, on the west by Patterson Street, on the south by High Street, and on the east by Shreve Avenue. This includes the area in controversy. The method of financing costs for this project was authorized by the Kentucky Court of Appeals on October 1, 1965. See Watkins v. Fugazzi, 394 S. W. 2d 594 (Ky. 1965).

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On July 22, 1968, the plan for the Lexington urban renewal project, R-63, was amended. This amendment to the 1965 plan provided for a Civic Center in an area bounded by Main, Patterson, High and Broadway Streets, and provided for an alternative use of historic preservation in the north half of the 200 block of West High Street. Seven of the buildings involved in this action are in the area with historic preservation designated as an alternate use. Any plan submitted for historic preservation was to meet standards which were explained at public meetings. If the buildings were not restored, they were to be demolished. HUD approved this first amendment on October 18, 1968.

In January, 1969, the urban renewal plan, Ky. R-63, was again amended by Lexington Urban Renewal Agency. This amendment provided for an increased expenditure of federal funds, a change in alignment of streets in the area. This amendment retained, however, the alternative use for historic preservation as contained in the July, 1968, plan and amendment. HUD approved this second amendment on May 8, 1969.

On May 9, 1969, and June 29, 1969, public advertisements appeared in newspapers inviting competitive proposals to be submitted for part of the land contained in the urban renewal plan, R-63. These proposals were formally opened before the Lexington Urban Renewal Agency on July 10, 1969. Two proposals were submitted at this time. One was from Citizens Union Bank and proposed construction of a $4,000,000.00 to $8,000,000.00 multi-story bank and office building which would ultimately employ one thousand persons. This proposal was determined by the Lexington Urban Renewal Agency to comply with their requirements. The other proposal came from Historic Lexington, Inc. (not a party to this action but of a class which plaintiffs purport to represent). Historic Lexington, Inc.'s proposal was for restoration of the buildings in this area. This proposal was determined by the Lexington Urban Renewal Agency to not be in compliance with their requirements. Historic Lexington, Inc. was notified of the plan's deficiencies and was given an opportunity to correct. Such corrections were not made.

Fourteen buildings in the Lexington urban renewal area were denominated "West High Street Historic District" and on July 10, 1969, were placed on the National Register of historical places. 16 U.S.C. 470. Official notice of this listing appeared on August 5, 1969 in 34 Federal Register.

On July 18, 1969, the Lexington Urban Renewal Agency voted to accept the proposal submitted on July 10, 1969, by

the Citizens Union Bank. On July 29, 1969, the regional HUD director notified the Lexington Urban Renewal Agency that he had "no objection to a disposal to the proposed redeveloper." Exhibit 11 of October 28, 1969, deposition of Jennie F. Bryant. The proposal of the Citizens Union Bank was accepted by the Lexington Urban Renewal Agency on September 3, 1969, and on that date a contract was entered into between the parties. The contract required the land to be cleared of all improvements. The deed to the property was tendered on October 1, 1969.

In September, 1969, the Lexington Urban Renewal Agency had advertised for demolition bids for buildings on the property sold to Citizens Union Bank. On October 14, 1969, Jennie Bryant, director of Lexington Urban Renewal Agency, received verbal approval from HUD for demolition of the seven buildings on the 200 block of High Street by Norwood Construction Co. That same day the demolition bid of Norwood Construction Co. was accepted. The demolition contract was entered into between the parties on October 15, 1969. During the evening of October 15, 1969, and the morning of October 16, 1969, demolition was begun on the buildings. This demolition completely destroyed one building and damaged two others.

Court action on this controversy has been in the Fayette County Circuit Court and this court. On October 16, 1969, substantially the same plaintiffs commenced action against substantially the same defendants, with the exception of George Romney. A temporary restraining order was issued to prohibit further demolition of the buildings by Norwood Construction Co. Judge Park of the Fayette Circuit Court on October 21, 1969, entered findings of fact and conclusions of law which dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted. In dismissing the complaint and dissolving the restraining order, Judge Park said "this is a final judgment insofar as the plaintiffs' cause of action is concerned." South Hill

Association, Inc. et al. v. Urban Renewal and Community Development Agency of the City of Lexington, et al., Fayette Circuit Court First Division No. 25992, Judgment of October 21, 1969. On October 22, 1969, the Kentucky Court of Appeals, sitting en banc, overruled plaintiffs' motion for interlocutory injunctive relief pending appeal.

Action was commenced in this court on October 17, 1969. A temporary restraining order was issued by this court on October 23, 1969, and a hearing was held October 31, 1969. At this hearing it was ordered that the parties enter findings of fact and conclusions of law from which this court could enter a judgment. Federal Rules of Civil Procedure 52. This has been done.

Relief requested in plaintiffs' amended complaint seeks: (1) a preliminary injunction and a permanent injunction without bond—a) against federal defendants enjoining them, including withdrawal of prior approval of funds, to remove or destroy the fourteen buildings in question until the court shall determine they have complied with federal law; b) to restrain federal and local defendants from taking steps to demolish or remove buildings in controversy, including affirmative orders to prevent private defendants from carrying out acts; c) to restrain private defendants from demolishing, destroying, or removing said building; (2) a declaration of rights among parties and reformation of contracts, deeds and agreements relating to destruction of buildings; (3) an order for defendants to reconstruct and repair damaged buildings; (4) an order for federal defendant to refer the matter to Advisory Council on Historic Preservation for comment and for recommendations; (5) court declaration that plaintiffs have rights arising under National Historic Preservation Act and National Housing Act and for court to issue mandamus against federal defendant ordering him to do his duties under the Act; (6) a grant of judicial review of action taken by HUD and Lex-

ington Urban Renewal Agency in undertaking to demolish said buildings; and, (7) all other appropriate relief to which the plaintiffs may be entitled.

The defendant, George Romney (HUD), has moved to dismiss the complaint on the grounds that: (1) plaintiffs lack standing to sue; (2) defendant has no authority over demolition; and, (3) plaintiffs have no right to a hearing.

The remaining defendants move to dismiss plaintiffs' complaint on the grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that plaintiffs are not real parties in interest and have no standing or capacity to bring this action; (3) that this court lacks jurisdiction because it appears on the face of the complaint that plaintiffs state no claim under the Constitution, Laws or Treaties of the United States; (4) that all matters and issues herein involved have been fully determined by the proceedings in state court; and, (5) that the plaintiffs are guilty of laches, waiver and are estopped from enforcing any right or remedies they may have under law.

Plaintiffs attempt to invoke the jurisdiction of this court under 28 U.S.C. 1331(a) by alleging that the amount in controversy exclusive of interest and costs exceeds $10,000 and that the claim arises under the Constitution, law or treaties of the United States. More specifically plaintiffs allege their claims arise under the National Historic Preservation Act of 1966, 16 U.S.C. 470f; the Housing Act of 1949 as amended, 42 U.S.C. 1451(c), (e), 1455(e), 1456(c)(6), (7), 1460(c); the Administrative Procedures Act, 5 U.S.C. 702, 703; 28 U.S.C. 1361; and 28 U.S.C. 1651.

In 1966, Congress enacted the National Historic Preservation Act. 16 U.S.C. 470 *et seq.* Congress found "that the spirit and direction of the Nation are founded upon and reflected in its historic past;" and "that the historical

and cultural foundations of the Nation should be preserved. . . ." 16 U.S.C. 470(a), (b). To implement this policy, Congress provided in 16 U.S.C. 470f that:

> "The head of any Federal Agency having direct or indirect jurisdiction over a proposed . . . federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any . . . building, structure, or object that is included in the National Register. The head of any such Federal Agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."

Congress amended the National Housing Act of 1949 so that it would be compatible with the National Historic Preservation Act. See 42 U.S.C. 1460(b)(2), 1460(c)(6), 1460(c)(9), 1460(c)(10).

In maintaining this action plaintiffs seek to couple the before described policy of historic preservation with 5 U.S.C. 702, 703, 28 U.S.C. 1361 and 28 U.S.C. 1651. The Administrative Procedures Act 5 U.S.C. 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. 703 of the same Act provides:

> "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory

judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

28 U.S.C. 1361 provides:

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The plaintiffs contend that HUD failed to notify and give a reasonable opportunity for comment to the Advisory Council on Historic Preservation of the proposed demolition of buildings registered pursuant to the National Historic Preservation Act. This, plaintiffs allege, violates 16 U.S.C. 470f and makes HUD (George Romney, Secretary) subject to mandamus action under 28 U.S.C. 1361 and subject to an injunction under 28 U.S.C. 1651. Plaintiffs further contend that the action of HUD would be reviewable under the Administrative Procedures Act. 5 U.S.C. 701 *et seq.*

Defendants deny these allegations and move the court to dismiss the complaint for the reason that plaintiffs lack standing to raise the issues in controversy. This court holds that the plaintiffs lack standing.

It is clear from the outset that plaintiffs do not have standing under the recent doctrine established by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968). Plaintiffs have established neither a logical link between their taxpayer status and the type of legislative enactment attached nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged. Supra at 102-3. It is clear, therefore, that plaintiffs do not have standing solely on the ground of being federal taxpayers.

It is likewise clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the seven buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. The Lexington Urban Renewal Agency had acquired title to these buildings in February, 1969, and the buildings were placed on the Register in July, 1969. None of the plaintiffs, though informed of the urban renewal plan's alternate use for historic preservation, submitted a proposal for development of the area. The plaintiffs' interest in the litigation is not sufficient to give them standing to bring a mandamus action under 28 U.S.C. 1361, an injunction under 28 U.S.C. 1651, or court review of administrative action 5 U.S.C. 701 *et seq.* They do not have a personal stake in the outcome. Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 927 (2 Cir. 1968).

Any attempt to gain standing plaintiffs seek under the "private attorney general" doctrine must also fail. This doctrine as developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir.

1965); Office of Communication of United Church of Christ v. Federal Communication Commission, 359 F. 2d 994 (D.C. Cir. 1966); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); and Road Review Leage v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967) seems to stand for the proposition that persons or groups who by their activities and conduct have exhibited a special interest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.

Such a doctrine provides standing under two circumstances: (1) when the plaintiffs are citizens of the area and their direct interests are to be affected, see Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, supra; and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest, in the area in controversy. Scenic Hudson Preservation Conference v. Federal Power Commission, supra; Road Review League v. Boyd, supra.

Plaintiffs in this action have met neither standard. Those plaintiffs who are citizens of the area, Mrs. Stathis Kafoglis and Mr. and Mrs. W. T. Dennis, have no interest in the seven buildings to be demolished in the 200 block of West High Street. The National Register for historic buildings has been in existence since 1966. Not until July 10, 1969, however, were any of these buildings placed on the Register. The Lexington urban renewal plan, since July, 1968, has provided an alternative use for historic preservation. None of the plaintiffs, however, have submitted such a plan. The plaintiffs have not sufficiently engaged in the administrative process to show a special interest in the con-

troversy so as to be included among those parties aggrieved or adversely affected by agency action. See Green Street Association v. Daley, 373 F. 2d 1 (7 Cir. 1967); Harrison-Halstead Community Group, Inc. v. Housing and Home Finance Agency, 310 F. 2d 99 (7 Cir. 1962); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N.D. Ill. 1968).

It is the conclusion of the court, therefore, that the plaintiffs lack standing to sue. If it had been concluded that plaintiffs had standing to invoke the jurisdiction of this court, dismissal of plaintiffs' complaint would still be in order.

If plaintiffs did have standing to bring this action, they could still not receive the relief they seek. The Lexington urban renewal plan, Ky. R-63, was first formulated in 1965 and was approved by HUD on June 7, 1966. At this time a "Loan and Capital Grant Contract" was entered into between HUD and Lexington Urban Renewal Agency. This plan was first amended in July of 1968 and provided for demolition of the buildings or an alternate use of historic preservation. This amendment was approved by HUD on October 18, 1968. The plan was again amended in January of 1969. The amendment carried the same provision as the first concerning demolition or preservation. This second amendment was approved by HUD on May 8, 1969. All of these contracts between the Lexington Urban Renewal Agency and HUD provided for the expenditure of federal funds for demolition of the buildings. At none of these times did any buildings in the plan area appear on the National Register for historic places. HUD was, therefore, under no duty to notify the Advisory Council on Historic Preservation. Rumors of buildings with historic significance is not enough to require HUD to take this action. Placement on the Register is what is required.

Based upon the loan and capital grant contracts, the Lexington Urban Renewal Agency sought proposals and

bids for the property in question. These bids were to be submited July 10, 1969. None of the plaintiffs submitted a proposal, but on the same day (July 10) placed the buildings on the National Register. Their contention that subsequent approval by HUD of demolition of some of these buildings without compliance with 16 U.S.C. 470f is without merit. 16 U.S.C. 470f and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies. Any other construction of the statute would place too great a burden on the urban renewal administrative process. See Judge Thornton's opinion in Kent County Council for Historic Preservation v. George W. Romney, Civil Action No. 6174 (W.D. Mich. October 2, 1969). Even if plaintiffs did have standing, approval of the last amendment to the plan, Ky. R-63, was prior to the listing of the buildings on the National Register. Thus, 16 U.S.C. 470f imposed no duty on HUD to notify the Advisory Council on Historic Preservation.

The issues heretofore resolved are dispositive of the case at bar. There is, therefore no need to consider other allegations made by the parties.

It is the opinion of this court: (1) that the Temporary Restraining Order Entered on October 22, 1969, should be dissolved; (2) that the plaintiffs' motion for temporary injunction should be overruled, Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied, 390 U. S. 921 (1968); Barron & Holtzoff § 1433; and, (3) that the motions to dismiss by all defendants should be sustained.

An order in accordance with this motion is this day entered.

(s) Mac Swinford,
Judge.

November 14, 1969.

APPENDIX "K"

1

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON, KENTUCKY

South Hill Neighborhood Association, Inc., Etc., and
Curtiss Harrison, Et Al., - - - - - *Plaintiffs,*

v.

George Romney, Et Al., - - - - - *Defendants.*

DEPOSITION OF FRANK J. GROSCHELLE.

Deponent: Frank J. Groschelle.
Date: October 27, 1969.

Stephen R. Pyevac, Reporter.

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The deposition of FRANK J. GROSCHELLE, taken on discovery, pursuant to notice heretofore filed, in Room 157, State Capitol Building, Frankfort, Kentucky, on October 27, 1969, at 9 A.M., and to be used in accordance with the Federal Rules of Civil Procedure.

Appearances.

For the Plaintiffs: Mr. Roger B. Sledd,
Lexington, Kentucky,

Professor Eugene F. Mooney,
Lexington Kentucky.

For the Defendants:

Urban Renewal &
Community Dev. Agency
of the City of Lextington,

Robert E. Featherston,

William R. Embry,

Byron Romanowitz,

D. C. Noble,

H. J. Hagler,

Jennie Bryant,

Mr. J. Montjoy Trimble,
Mr. C. Thomas Greene,
Lexington, Kentucky.

* * * * * * *

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Q. In connection with the National Historic Preservation Act is there any sort of a Committee or Board of Review or any such organization which assists you in discharging your duties?

A. There is a counterpart, an organization that has been and was submitted, the names of which were submitted, excuse me, to the United States Department of Interior Park Service for their approval as a Committee. And this is in

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these records as to when that was submitted.

Q. Who are the members of the Committee at the present date?

A. I will have to look.

Q. Refer to those.

A. (Referring to documents.)

(Off the record remarks.)

A. Presently there are six members. Mrs. Millard Cox of 21 River Hill Road, Louisville, Kentucky.

Mr. Earl D. Wallace, 1211 Richmond Road, Lexington, Kentucky.

Mr. Howard C. Lawson, Jr., Bureau of State Planning, Bush Building, Frankfort, Kentucky.

This is my representative too and he is present.

Mr. Charles N. Bayless, 620 Euclid Avenue, Lexington, Kentucky.

Mr. Subleth Walton, 2206 Frankfort Avenue, Louisville, Kentucky.

Doctor Henry F. Dobyens, 212 Bradley, University of Kentucky, Lexington, Kentucky.

There were two other members of the National Register Review Board, one member—excuse me, correction, William B. Floyd, Walnut Street,

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Lexington, Kentucky, who is now in Washington, employed there and is no longer a member of the Board and Curtis B. Harrison, formerly served as Secretary and he is, was or is with the Department of Finance.

* * * * * * *

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Q. Mr. Groschelle, would you identify what has been marked as Defendants' Exhibit number three?

A. (Referring to document) A letter from William J. Murtaugh, Keeper of the National Register, United States Department of the Interior, National Park Service, Office of Archaeology and Historic Preservation, a letter indicating that the Review Board of Kentucky with the addition of Mr. Henry F. Dobyens has been approved by this office.

Q. Now, both that Exhibit number three and Exhibits one and two are part of the records of your office, are they not, Mr. Groschelle?

A. Yes, sir.

Q. This letter dated July 2, 1969, the Defendants' Exhibit three states: (Reading aloud).

"In addition to this Review Board

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the Grants Guide calls for a professional staff to undertake a State-wide historic sites survey."

Who are the members of the professional staff who undertook a State-wide histhoric sites survey, Mr. Groschelle?

A. This material on the survey was submitted to the, I suspect, Ad Hoc Group prior to that date for their disposition and as of that date and as of today, there is no such animal.

Q. Your testimony is that there is no professional staff who has ever undertaken a State-wide historic sites survey?

A. That is right.

Q. As I take it, the only action of the Commonwealth of Kentucky is that to have appointed you as a State Liasison Officer?

A. (Nodding head in the affirmative.)

Q. And to establish a Review Board for Kentucky?

A. (Nodding head in the affirmative.)

Q. Neither the Governor nor your office nor any other office of the Commonwealth of Kentucky then has undertaken to appoint a professional

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staff to undertake a State-wide historic sites survey?

A. Names have been submitted but to date no professional qualifications of the staff have been submitted to the Department of Interior.

Q. Your testimony is that there is no staff at this time?

A. (Nodding head in the affirmative.)

Q. When was Mr. Curtiss Harrison first appointed to the State Review Roard?

A. He never was. He served as a Secretary for the,

never a member of the Review Board. He simply served as Secretary and Liaison between the Kentucky Heritage Commission and the State Review Board, served as their Secretary.

Q. What were the circumstances surrounding his appointment as Secretary to the Review Board?

Mr. Sledd: Note an objection to the question, of the, for the Plaintiff Curtiss Harrison, on the grounds that, that it is irrelevant and, as it affects the placing of the buildings in question on the National Register.

Q. My question, Mr. Groschelle, was state the circumstances surrounding the appointment

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of Mr. Harrison as Secretary to the Review Board. You do appoint him to the Board?

A. Yes or—no,—no,—no, excuse me, no. We simply asked him to serve as Secretary.

* * * * * * *

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Q. Is Mr. Harrison still connected with the Board of, Review Board of Kentucky?

A. He is not as of—I guess you want a date?

Q. Yes, I would like to know the date when he quit performing that function.

A. (Referring to records) August 22, 1969.

* * * * * * *

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Q. What happened that night at Bluegrass Field?

A. Mr. Harrison and Mr. John Vanderwier.

Q. Who is Mr. Vanderwier?

A. Mr. Vanderwier is a member of my staff and serves in the present capacity as Special Assistant for Housing and Community Developments.

Q. Okay. What was his capacity on the night of July 9, 1969?

A. Director of the Division of Development, Information or Development Assistant, excuse me.

Q. Now, tell me what happened that night at Bluegrass Field?

A. Mr. Vanderwier and Mr. Harrison met me out there at the airport as I was coming off the plane from Washington, D. C. and stated to me that,—

Q. Who stated to you, Mr. Groschelle?

A. Mr. Vanderwier, that Mr. Harrison

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had brought some papers over to the airport for me to sign. I felt that, at 10:30 at night I thought it could have been done the next morning at the office. And I asked why here at the airport.

Then was informed by Mr. Harrison that he was catching a morning flight to Washington with the application papers to present them to the National Historic Preservation Trust for inclusion on the National Register.

I asked Mr. Harrison if the Committee hadn't met and approved this particular application for submission to the National Register and was informed by Mr. Harrison that this was true and correct.

I queried Mr. Vanderwier as to whether this was true and correct and he said as far as he knew it was.

And I said, "Did you attend the meeting," and he said, "No, I did not. Mr. Harrison has assured me that this action was taken by the Kentucky Historic Society Preservation Review Board."

Mr. Harrison informed me that if I would sign these that we could get them to Washington tomorrow and had been assured that he could get this parcel placed on the Federal Register. He likewise said that the Lexington Urban Renewal

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office would attempt to indicate a project for the utilization of these properties, either the next day or the 11th, and

that—I don't know what the term is, the—that the Urban Renewal Office really did not have a bona fide project and that putting this on the National Register would, would indicate or would seek a response from Urban Renewal administration as to whether they had a valid project or not.

On the good faith of Mr. Harrison and good faith of Mr. Vanderwier of my staff I signed this particular document, the application for inclusion on the Federal Register.

Mr. Harrison did take it to Washington the following day and it was placed on the National Registration effective the 10th of July, 1969, the day prior to the Urban Renewal office taking bids on the properties.

Q. For the record and for your information, Mr. Groschelle, the bids were taken on the, on the morning of the 10th?

A. (Nodding head in the affirmative.)

Q. And did either Mr. Vanderwier or Mr. Harrison inform you that Urban Renewal was opening bids for proposal for the property on the

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next morning?

A. Mr. Harrison did,—correction here, wait a minute. They would be taking bids was the statement that was made to me.

Q. Did either of them tell you that they were being taken on the next morning, the morning of the 10th, that they were being opened the next morning, the morning of the 10th?

A. Question, opened or taken means two separate things to me. Taken and would be opened sometime later.

Q. Did either of those persons tell you that the bid opening was going to be in the morning, July 10th?

Mr. Sledd: Note an objection to that question for the plaintiff for the reason that it is irrelevant, incompetent and immaterial to the placing of these buildings on the National Register.

Q. Answer the question, Mr. Groschelle.

A. Question being taken—they were taking bids?

Q. No. The question is: Did either Mr. Harrison or Mr. Vanderwier tell you that bids were being opened by Urban Renewal?

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A. No.

Q. On the morning of July 10th?

A. No.

Q. Mr. Groschelle, have you ever at any time made any statements to any persons to the effect that you were duped into signing these documents by Mr. Harrison and Mr. Vanderwier?

Mr. Sledd: Note an objection of the Plaintiff to that question.

Mr. Trimble: This is discovery deposition, Mr. Sledd, and I have a right to ask any question which might lead to the, to the discovery of relevant evidence showing the good faith of your clients.

Q. Now, answer the question, Mr. Groschelle.

Mr. Sledd: Well, I will note the objection of Plaintiff to that question and I would move that that question be certified to the Court and have a ruling from the Court as to whether or not Mr. Groschelle has to answer that question on the basis that once these buildings do appear upon the National Register and once Mr. Groschelle—and records are produced to show that Mr. Groschelle in the normal course and duties of his office had

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signed such documents that the Urban Renewal Commission or any other person cannot go behind those records as they appear on their face and that they speak for themselves.

Mr. Trimble: Well, I object to your testimony, Mr. Sledd.

Q. The question is, Mr. Groschelle, and you can answer the question: Whether or not since July 9, 1969 you ever said to any person that you were duped into signing these papers by Mr. Vanderwier and Mr. Harrison or have you said any words to that effect to any person?

A. Words to that effect?

Q. Yes sir, yes sir, either used the phrase duped or words to that effect?

A. I have used the phrase and corrected it at that particular point because duped is a little bit too strong.

Q. Well, what did you say and to who?

A. I—well, it would be difficult. I have said it to a number of persons. I have—

Q. (Interrupting) For example?

A. Mrs. Jennie Bryant most recently.

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Q. And what did you say to Mrs. Jennie Bryant recently?

A. That I felt that I had some misgivings and the record will indicate that I have had some misgivings after signing the document on July 9th about the manner in which that particular application was handled.

I even used the term and I am sure that in her deposition I hope that she will, in her deposition, remember that I corrected that particular term being duped. The record will indicate my actions as a result of that signing of that document, on July 9th. I did say to Mr. Bryant—Mrs. Bryant, excuse me, last week, Tuesday, I think, or Wednesday, Tuesday—I wasn't here on Wednesday, that I had misgivings about signing it because the manner in which it was brought to me, the later research that I took upon myself as a Staff Director to determine just what was going on.

This is just one of the duties that I performed and had not given it my full attention at that particular time.

I have discussed it with a number of people.

Q. Is it your testimony that you could have used that phrase "I was duped into signing

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these papers," or some similar phrase to other persons than Mrs. Jennie Bryant?

A. I have.

Q. You have stated that you conducted some research to find out what was going on?

A. Yes.

Q. What did you find out as a result of your research, Mr. Groschelle?

A. Prior to this happening, I had sent memorandums from this office to the Historic Survey and Review Committee requesting that there be certain operational procedures established by this particular Review Board. That these procedures be established and keeping with the information we had sent to the Keeper of the National Register. Certain procedures to be followed that after looking into it on, beginning on July 10th that I did not believe that these procedures had been followed.

April 14th was the date I am looking for.

Q. Of what year?

A. 1969.

Q. The letter with carbon copy to Mr. Curtiss Harrison in which this letter to Mr.

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Murtaugh, Keeper of the National Register, the letter states that I am forwarding how we as in Kentucky would intend to operate to meet the requirements of the National Historic Preservation Act of '66 until the Board and its operational procedures were formally established.

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Mr. Trimble: Would you read the question back, Steve, please.

The Reporter: (Reading aloud.)

"Q. After you investigated the matter of the registration of these properties on West High Street in Lexington, did you find that the procedures established by you had been followed?"

Q. Would you answer the question, Mr. Groschelle?

A. I did not find that they had been followed.

Q. Your testimony is that the procedures had not been followed?

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A. Correct.

Q. Mr. Vanderwier and Mr. Harrison at the airport in the late evening of July 9, 1969 had assured you that your procedures had been followed, had they not?

A. Yes, I presumed that.

Q. Well, I believe your testimony was that Mr. Harrison said that they had been followed and Mr. Vanderwier said that they had been followed insofar as he knew?

A. Well, the question was to them had the Board given this their voting approval and support, the presumption on my part is that they had followed the procedures to get to that place where they voted to submit the application.

* * * * * * *

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Mr. Trimble: Mark this.

(Whereupon Defendants' Exhibit #13 was duly received, marked and made a part of the record herein.)

Q. Will you identify, Mr. Groschelle, what has been marked as Defendants' Exhibit thirteen?

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A. Exhibit thirteen is a telegram which I sent to the Advisory Council for Historic Preservation on October 20, 1969, requesting them to investigate, to consider and comment to HUD Housing and Urban Development, the pro-

posed removal of several buildings on West High Street in Lexington, Kentucky. And council was further requested to explore all possibilities and make recommendations for preserving the historical significance of this area.

Q. To whom did you send copies of that telegram?

A. S. K. Stevens, Director, Pennsylvania Historical Commission, Harrisburg, Pennsylvania, who was Chairman of that Advisory Council.

Judge Max Swinford, Federal District Court in Covington, Kentucky.

Judge James Park, Jr., of Fayette County, Lexington, Kentucky.

Professor Eugene F. Mooney, College of Law, University of Kentucky, and to Eugene F. Mooney of the Federal District Court.

Q. How did you happen to send copies of that telegram to those people you just mentioned, Mr. Groschelle

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A. I was requested to consider the position of both the Plaintiff and the Defendants in this particular case, requested to further extend the opportunity for both of these parties to hopefully to arrive, and hopefully to arrive at some sort of a compromise circumstance. And I felt, if I may add this, counselor, I felt that this is an obligation that I had normally to keep the community from getting a distorted view with one another.

To, and also to attempt to cause a compromise circumstance to be arrived at.

Q. Well, when you sent this telegram on October 20, 1969, Mr. Groschelle, were you aware that there were two lawsuits pending between these parties, one in State Court and one in Federal Court?

A. I don't know that I was aware of two. I knew there was one pending with Judge Park's Court.

Q. Well, I note that you sent a copy to District Judge Max Swinford.

A. Yes, sir.

Q. Federal District Court, Covington, Kentucky.

A. Yes.

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Q. How did you happen to send copies of this telegram to Judge Max Swinford and Judge James Park, Jr.

A. As I said, I was requested by Counsel for the, which one is it—

Q. Preservationists.

A. Yes.

Q. Who made that request of you?

A. Mr. Mooney.

Q. And how did Mr. Mooney make that request?

A. That it would—

Q. (Interrupting) By in person or by phone call is what I would like to know?

A. Oh—oh, I see. By phone call, yes.

Q. When did you receive that call?

A. Who has got a calendar?

Q. I would like for you to pinpoint the date and time as close as possible. If you need to refer to any record or memos of telephone calls, received in the office, I would like for you to establish it as best you can.

A. (Referring to calendar) Sunday the 19th of October, approximately 9:30 P.M.

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Q. In the evening?

A. Yes, sir.

Q. You were home, I take it?

A. I was home.

Mr. Sledd: Note the objection.

Q. You keep a record of phone calls that you receive?

Mr. Sledd: Note the objection of the Plaintiff to this line of questions and the motion of the Plaintiff that all questions relating to the request of Mr. Groschelle to send

any telegrams be stricken from the record of this deposition for the reason that Mr. Groschelle in sending whatever telegrams he sent, sent them as in his capacity as State Liaison Officer for the Kentucky Historic Preservation and that any decision made to send them was his decision in that capacity and not based on the request of Plaintiffs' counsel.

Q. Mr. Groschelle, I take it you received the call from Mr. Eugene F. Mooney, Professor at the College of Law, University of Kentucky, in the evening of Sunday, October—

A. 19th.

Q. 19, 1969. Is that right, sir?

A. That's right.

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Q. And which he suggested to you that you send the telegram to certain people?

A. The words he suggested—

Q. Yes, asked you or you picked the words, sir?

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Q. How did it come about Mr. Groschelle, that you sent copies of this telegram to District Judge Max Swinford and Judge James Park, Jr. of the Fayette Circuit Court?

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A. When my client talked to Mr. Mooney he suggested that, he also informed me that he would be going to Covington, Kentucky, the next day and that if I would see fit to send this telegram that he would appreciate having it sent to Judge Swinford and himself in Covington.

Q. Why did you send a copy of Judge James Park, Jr.?

A. As Mr., at counselor Mooney's suggestion.

Q. Did Mr. Mooney inform you that there was then

two actions pending, one in State Court of Kentucky and one in the United States Federal District Court?

Mr. Sledd: Note an objection of Plaintiff to that question for the reason it has previously been asked and that the witness has already answered. That at the time Mr. Mooney talked to him he did not recall whether Mr. Mooney had said that the actions were pending in the State Court and Federal Court or not.

Mr. Trimble: I am going to ask the question again, Mr. Sledd, and I would appreciate you not suggesting to the witness how to answer my questions.

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A. To the best of my knowledge and remembrance, I do not know that there was either suggestion that they were pending. I knew that it was pending.

Q. You read the newspapers, don't you?

A. I knew newspaper coverage in the, in Judge Park's Court to the best of my recall.

Q. Is that why you sent the copy to Judge Park because you knew it was pending in State Court or did you send the telegram to Judge Park because Mr. Mooney suggested that you send it to him?

A. No. I sent it in order to—

Q. (Interrupting) Now, I don't know what—I don't want to know why you sent it, Mr. Groschelle. My question is—

Mr. Sledd: (Interrupting) Now, I am going to object unless you let him answer the question. You have asked the question and now give him a chance to answer it.

Q. My question—

Mr. Trimble: (Interrupting) Well, I am asking the question, Mr. Sledd. You can object all you want to.

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Mr. Sledd: And I am going to object to your interruption of the witness until he has completed his answer.

He is attempting to be responsive to your questions and he doesn't have to answer more than one question at a time.

Now, I think that is what he is trying to do.

Mr. Trimble: Read the question back, Mr. Pyevac.

The Reporter: (Reading aloud.)

"Q. Now, I don't know what—I don't want to know why you sent it, Mr. Groschelle. My question is—"

A. All right. Counselor, Mr. Mooney suggested that I send the telegram to Judge Park. I sent it to Judge Park and the other persons listed on Exhibit thirteen because I personally thought that it was a responsibility that I have as State Liaison Officer to do what I can to keep the good citizens of the community of Lexington from splitting right down the middle on something that obviously is a controversial issue.

As a result of that any telegram that I might have sent was in totally good faith for that purpose. And not as a response to simply to a request from Mr. Mooney.

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Q. The idea though of sending the telegram was, was Mr. Mooney's, wasn't it, Mr. Groschelle?

A. It had not occurred to me, that it might be something that would offer an opportunity to compromise and I appreciated the suggestion.

Q. And the idea of sending it to Judge James Park was Mr. Mooney's idea originally?

Mr. Sledd: Object to that question.

Mr. Trimble: He can answer it.

Mr. Sledd: For the reason that he has already stated how he happened to send the telegram to Judge Park.

A. The answer to the question is yes.

Q. And the idea of sending the telegram to Judge Swinford was Mr. Mooney's original idea although you concurred in it for the reasons you have stated?

A. Yes, sir.

Q. Now, did Mr. Mooney ever suggest to you or have the idea that a copy of that telegram should be sent to counsel for the Urban Renewal Commission of the City of Lexington?

A. No.

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Q. All right, sir. Mr. Groschelle, according to the records of this office, how many places in Kentucky have been registered on the National, National Register as a result of the 1966 Act

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of Congress?

A. One.

Q. And would that one be, I suppose, the so-called Historic District of High Street in Lexington, Kentucky?

A. That is correct.

Q. And that is the only place that has ever been listed by the Commonwealth of Kentucky as a result of the 1966 Act, is that correct, sir?

A. That is correct.

Q. Has the Commonwealth of Kentucky ever proposed to the National Register that any other places ever be listed? Have you submitted any?

A. No.

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Q. Mr. Groschelle, you mentioned that in your conversation at the airport in Lexington on July, the night of July 9th, that you were informed that the full Board, full Review Board had voted to recommend the registration of these properties. Is that right, sir?

Mr. Sledd: Object to that question because of its misleading nature and the form of it for the reason that Mr.

Groschelle has previously testified that his concern was whether or not the

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unanimous Board, whether the Board had reacted unanimously.

Mr. Trimble: I will rephrase the question, Mr. Sledd.

Q. You testified that what you were concerned about was that the Board had unanimously recommended that these properties be listed. Is that right, sir?

A. That's right.

Q. And did you make any inquiry of either Mr. Harrison or Mr. Vanderwier, that is whether the Board had acted unanimously?

A. Yes. I asked Mr. Vanderwier and he said to the best of his knowledge. He deferred the last part of the question to Mr. Harrison and the affirmative nod was given and I accepted it at that point as being true facts.

Q. And you have since discovered, have you not, Mr. Groschelle, that Mr. Lawson who is your representative on the Board had in effect left the meeting prior to the vote, had he not?

A. That's right.

Q. Did either Mr. Vanderwier or Mr. Harrison tell you that Mr. Lawson had left the meeting before the vote?

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A. No.

Q. On cross examination by Mr. Sledd you stated that in effect that several historic properties had been, strike that, Steve.

You stated on cross examination by Mr. Sledd that several historic properties were in the process of being nominated for registration. Is that right, sir?

A. That's right.

Q. And in fact, no properties had been mailed or sent to Washington except this High Street property, is that right, sir?

A. That's correct.

Q. It is also true, is it not, Mr. Groschelle, that one of the properties which is in the process of being nominated is the Savage Cave in Adairville, Kentucky?

A. That's right.

Q. It is also true, is it not, that this property is owned by Mrs. Genevieve H. Savage who is in fact a member of the Kentucky Board, isn't that right, sir?

A. (Referring to documents.)

Mr. Sledd: Note the objection of the Plaintiff to this question.

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A. I don't think Mrs. Savage is a member of the Board.

Mr. Sledd: Completely irrelevant and immaterial.

A. That indicates her here on the third page that she was present and counted as a member, but I don't think Mrs. Savage's name was ever submitted to the National Park Service as a member.

Q. Well now, I don't quite understand your testimony. You are telling me she is a member or she is not a member? What is the list that he submitted with that letter of July 2?

(Counsel referring to document.)

Q. Now, referring now, Mr. Groschelle, to the membership roster of the Kentucky Professional Historic Preservation Review Board which is attached to Defendants' Exhibit seventeen—excuse me, Exhibit seven, I will again ask you is not Mrs. Genevieve Savage a member of the Board?

A. (Referring to document.)

Mr. Sledd: Go ahead and answer the question.

A. Mrs. Savage's name was submitted

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to the Board. It was not approved and that is the reason that Doctor Dobyens's name was offered as a substitute.

Q. I would like for you to confer with your staff and tell me what members of the Board were present at the meeting of July 9, 1969?

Mr. Sledd: Note an objection to that question on the basis that the minutes—

Mr. Trimble: For purposes of discovery.

Mr. Sledd: (Continuing)—are the official documents which reflect who was present.

Mr. Trimble: The minutes don't reflect it.

Mr. Sledd: And that it is hearsay, incompetent evidence for the—

Professor Mooney: Not proper discovery.

A. Counselor—

Q. Yes.

A. I am advised by my staff that those members of the Review Board present on the July 8th meeting were present at the time of the vote, were Mrs. Cox, Mr. Wallace, Mr. Floyd, Mr. Bayless and Mrs. Savage substituting for Doctor Dobyens.

Q. What do you mean substituting—

now, it is your testimony, Mr. Groschelle, that present at the meeting of July 8th was Mr. Bayless who had been appointed by you and approved by the National Board, right?

A. (Nodding head in the affirmative.)

Q. Mrs. Cox who had been appointed by you and approved by the National Board?

A. (Nodding head in the affirmative.)

Q. Mr. Wallace who had been appointed by you and approved by the National Board?

A. (Nodding head in the affirmative.)

Q. Mr. Floyd who had been appointed by you and, was absent, is that right, sir?

A. No. Mr. Floyd was present also.

Q. Did you not testify that Mrs. Savage acted for Mr. Floyd?

Mr. Sledd: No, Dobyens.

Q. Excuse me.

A. Mr. Dobyens.

Q. And Mr. Dobyens had been appointed but was absent?

A. Mrs. Savage had been appointed but she was turned down and Doctor Dobyens's name was submitted in place of Mrs. Savage which was approved on July 2nd.

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Q. Mrs. Savage's name had been submitted but disapproved?

A. That's right.

Q. Consequently you appointed Mr. Dobyens?

A. That's right.

Q. Whose name was approved by the National Board.

A. On July 2nd.

Q. Yet Mrs. Savage voted in place of Mr. Dobyens who was absent, is that right, sir?

A. That's what it says there. I wasn't there.

Q. Have you been so advised by members of your staff, to wit Mr. Lawson?

A. I was advised that Mrs. Savage attended in place of Mr. Dobyens.

Q. All right. The minutes, however, reflect that the Board acted unanimously, did it not?

A. Yes, sir.

Q. But Mrs. Savage was not a member of the Board, was she, sir?

A. Nope.

Q. So the members of the Board who

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acted were Mr. Bayless, Mrs. Cox, Mr. Floyd and Mr. Wallace, is that right, sir?

A. Yes, sir.

Q. Mr. Lawson being absent when the vote was taken?

A. That's right, that's right.

Q. And Mr. Dobyens being absent completely?

A. Uh-huh.

Q. At the airport on the night of July 9th, were you informed by either Mr. Harrison or Mr. Vanderwier that Mr. Dobyens had been absent but that Mrs. Savage had voted for him?

A. No, I was not advised as such.

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APPENDIX "L"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON, KENTUCKY

No. 2080

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ETC., and
CURTISS HARRISON, ET AL., - - - - *Plaintiffs,*

v.

GEORGE ROMNEY, ET AL., - - - - - *Defendants.*

DEPOSITION OF DR. WILLIAM J. MURTAGH.

Deponent: Dr. William J. Murtagh.

Date: October 30, 1969.

Stephen R. Pyevac, Reporter.

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The deposition of DR. WILLIAM J. MURTAGH, taken as evidence on behalf of the Defendants, pursuant to notice and Subpoena Duces Tecum heretofore filed, in Room 6443, Department of Interior, Washington, D. C., on October 30, 1969 at 1:30 P. M., and to be used in accordance with the Federal Rules of Civil Procedure.

Appearances.

For the Plaintiffs — Mr. Roger B. Sledd, Lexington, Kentucky.

For the Defendants: Mr. C. Thomas Greene, Lexington, Kentucky.

DOCTOR WILLIAM J. MURTAGH, called on behalf of the Plaintiffs (sic) and, after being first duly sworn, was examined and testified as follows:

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Direct Examination by Mr. Greene.

Q. Just for the record, Doctor, would you state your name and address, please?

A. My name is William J. Murtagh, you want the home or office?

Q. Just office address.

A. 801 19th Street, Northwest, Room 618, Washington, D. C.

Q. And you hold a Doctor's degree in what, sir?

A. History of Arts and Architect, University of Pennsylvania.

Q. And where are you employed, and in what capacity?

A. I am employed in the National Park Service of the Department of Interior as Keeper of the National Register.

Q. And to what Register do you have reference?

A. The National Register of Historic Places.

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Q. Now, of the seven people listed in that document for nomination as members of the Historical Preservation Review Board, how many were accepted?

A. Six.

Q. And who was not accepted, please, sir?

A. Mrs. Genevieve Savage, Archaeologist.

Q. And what was the reason for her not being accepted?

A. Not sufficiently professionally qualified.

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Q. Did the State subsequently thereto submit someone to replace Mrs. Savage who was not accepted?

A. Yes.

Q. And who was that, please?

A. Henry F. Dobyens.

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Q. I believe you have testified that Kentucky has to date made one nomination of properties for inclusion in the National Register under the 1966 Act. Is that correct?

A. Correct.

Q. And what are those properties?

A. The West High Street Historic District in Lexington, Kentucky.

Q. And that district consists of what?

A. (Referring to document) The north side of the one hundred, two hundred and three hundred blocks of West High Street in Lexington.

Q. Now, are these nominations made in writing?

A. They are made on forms submitted

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to the States, to the State Liaison Officer.

Q. And then the forms are filled out at the State level and submitted to the—

A. Yes.

Q. National Registry?

A. Yes.

Q. And when was Kentucky's form submitted, do you know?

A. This was received in our office on July 10, 1969.

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Q. Now, Doctor, is it correct that this nomination was submitted under the procedures contemplated by Section 2.9 of the Grants Manual as an advanced nomination?

A. Yes, sir.

Q. And Doctor, is it further correct that Section 2.9 of the Grants Manual requires the unanimous approval of the

Professional Review Committee and the State Liaison Officer to the properties being nominated being unquestionably worthy of entry in the National Register?

A. Yes.

Q. Doctor, prior to the receipt of the nomination for these buildings which was delivered to you by Mr. Harrison on the 10th of July, has there been any discussion between yourself or any members of your staff with any members of the Review Board or the State Liaison Officer or his agent or employee concerning these properties?

A. Yes, sir.

Q. And would you tell us what, was that communication to you?

A. Yes.

Q. Who communicated with you concerning that?

A. Mr. Harrison.

Mr. Sledd: Excuse me now, he is not being responsive to the question—yes, he is, all right.

Q. And when was that communication, sir?

A. Well, I can't tell you exactly. It was by telephone saying that there was an intent to make that submission. But I don't remember the exact date.

Q. And if you recall, approximately how long before the submission was made was this telephone call made?

A. I would hesitate to say. I honestly don't remember.

Q. Was it a matter of weeks or a matter of months or matter of days?

A. No, it would be a matter of weeks certainly.

Q. And did Mr. Harrison in that telephone conversation inform you that there was a necessity and desire that these properties be rushed through, so to speak, and approved as quickly as possible?

Mr. Sledd: Note an objection of

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counsel for the Defendants (sic) as to this question for the reason that it is irrelevant, incompetent, and immaterial as to the issues in this litigation.

Mr. Greene: You may answer.

Mr. Sledd: And I instruct the witness not to answer the question.

Mr. Greene: You may answer.

Mr. Sledd: I ask that the question be certified to the Court to determine if it is proper grounds for discovery.

Mr. Greene: Well, Mr. Sledd is aware that the doctor is a witness, not a party to this action and he cannot be instructed not to answer the question. As to the admissibility of the question, it can be taken up with the Court at the proper time.

You may answer the question.

Mr. Sledd: I may advise the witness that he can require the question be certified to the Court as to whether or not he does have to answer.

Mr. Greene: Well, I am going to object to Mr. Sledd instructing him or advising the witness since he is here as counsel for the Plaintiffs and not as counsel for the witness. You may answer the question.

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A. Mr. Harrison indicated that there was an Urban Renewal program in the area. Upon questioning on my part I was assured that no contractual agreements had been entered into.

Q. Did he indicate that this was the reason that the documents would be hand delivered, and that there was some urgency in having them appear on the Register?

A. Yes, I guess so. I would have to answer yes to that.

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Q. Now, Doctor, I want to pose to you a hypothetical

question. Will you assume that a State has nominated and has accepted a State Liaison Officer;

Will you assume further that the State

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had submitted for acceptance a State Advisory Board of seven members;

Will you assume further that the office of History and Archaeology had rejected one of those members, let's call her Mrs. Savage;

Will you assume further that the State submitted a replacement nominee for Mrs. Savage and let us call him Doctor Dobyons and that this replacement formally was accepted thereby giving the State a State Advisory Committee composed of seven members which have been approved and accepted by the proper Federal authorities;

Will you assume further that the State has not submitted a survey or a plan as contemplated in the Act;

Will you assume further that the State Advisory Board calls a meeting at which six persons were present, five of the persons present having been accepted by the Federal Agency and the sixth person present being Mrs. Savage who is not accepted but who purports to act for one of the accepted members who is absent;

Will you assume further that at this meeting a discussion is held to consider the nomination of certain properties for inclusion in the National

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Register;

Will you assume further that during the course of the discussion one of the members present excused himself indicating that he will not return to the meeting leaving five people present, four accepted members and Mrs. Savage;

Will you assume further that after this person has excused himself and while there are the five persons present

a vote is taken on the submission of the properties being considered and that persons present all voting including Mrs. Savage to determine to submit these properties for consideration.

Now, Doctor, on the basis of these assumptions, for this hypothetical question in your opinion as the Keeper of the National Register, would the action of this meeting satisfy the requirements of the Office of History and Archaeology, particularly of the Office of Archaeology and Historic Preservation for the inclusion of the properties in the National Register?

Mr. Sledd: Now, I—

Mr. Greene: Wait a minute.

Q. (Continuing) —prior to the submission of a plan and survey?

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A. No.

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Q. Continuing with the same assump-

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tions, let us assume that these facts later became known to the Office of Archaeology and Historic Preservation, would the Office of Archaeology and Historic Preservation and would yourself after you learned of these facts take any steps to have the properties listed on the National Register whether they be one building or several removed from the National Register until proper compliance had been made?

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A. We would first of all apprize the State of this infraction of the Grants Guide and request the State to comply with the Section that had not been complied with and trusting that the State would take means to rectify this.

If the State did not take means ultimately to rectify I see where we would have no alternative but to remove it from the Registry.

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